Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

SANDRA HENSLEY, *et al.*,
Petitioners,

v.

NORTHWEST PERMANENTE P.C. RETIREMENT PLAN AND TRUST, a defined contribution pension plan; *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that the legal conclusion of a plan administrator with regard to the meaning of the term "employee" as used in an ERISA plan is entitled to deference by a reviewing court?

2. Whether the Ninth Circuit correctly held that pension plan administrators have the discretion to interpret an undefined term in a pension plan (in this case, the term "employee") in a manner that is inconsistent with its clear, well-established federal common law definition?

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Ninth Circuit:

Sandra Hensley, plaintiff-appellee.

John Wiest, Jr., plaintiff-appellee.

Linda Onheiber, plaintiff-appellee.

Donna Hohnstein, plaintiff-appellee.

Northwest Permanente P.C., an Oregon corporation, defendant-appellant.

Northwest Permanente P.C. Retirement Plan and Trust, a defined contribution pension plan, defendant-appellant.

Retirement Plans Committee of the Northwest Permanente P.C. Retirement Plan and Trust, an unincorporated association, defendant-appellant.

Permanente Physicians Retirement Plan for Northwest Permanente P.C., a defined benefit plan, defendant-appellant.

The Administrative Committee of Permanente Physicians Retirement Plan for Northwest Permanente P.C., an unincorporated association, defendant-appellant.

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PETITION FOR A WRIT OF CERTIORARI

Sandra Hensley, John Wiest, Jr., Linda Onheiber and Donna Hohnstein, on behalf of themselves and all others similarly situated, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-33a) is reported at 258 F3d 986 (9th Cir. 2001). The district court's opinion granting summary judgment to plaintiffs-appellees (App., *infra*, 33a to 44a) has not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2001. (App., *infra*, 4a.). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves §1132 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132 (App., *infra* 45a to 54a).

STATEMENT OF THE CASE

Respondent Northwest Permanente P.C. ("NWP") is a private corporation that provides services to members of the Kaiser Permanente Medicare Care Program ("the Kaiser Program"). The Kaiser Program provides prepaid health care services to employees and individuals enrolled in the Kaiser Health Plan, a non-profit qualified health maintenance organization. The Kaiser Program maintains an affiliate, Kaiser Foundation Hospitals, to provide hospital facilities. The Kaiser Health Plan provides administrative and financial services within the Kaiser Program and contracts with independent groups of physicians to provide medical services. (App., *infra*, 5a).

Petitioners herein, a group of nurse practitioners and physicians assistants receive their compensation and retirement and health benefits from the Kaiser Health Plan. However, they work with NWP physicians and other health care professionals. (App., *infra*, 5a to 6a). NWP physicians are involved in their supervision and work scheduling and participate in the setting of recruitment, training and continuing education policies. NWP is involved in hiring and firing decisions, performance reviews, pay adjustments and in the formulation of petitioners' job descriptions. NWP makes decisions concerning petitioners' vacation time, sick leave and leaves of absence. NWP also provides petitioners' malpractice insurance. (App., *infra,* 60a to 61a).

NWP sponsors two pension benefit plans for its employees: the Northwest Permanente P.C. Retirement Plan Trust ("the NWP Plan") and the Permanente Physicians Retirement Plan for Northwest Permanente P.C. ("the Physicians Plan"). The NWP Plan is a defined contribution plan administered by a ten-person committee appointed by NWP's president. The Physician's Plan is a defined benefit plan administered by a ten-member committee comprised of physicians and employees of the Kaiser Health Plan and various medical groups. (App., *infra*, 6a). Both plans are governed by plan documents that set forth the criteria for eligibility to participate. (App., *infra*, 55a to 59a).

Both the NWP Plan and the Physicians Plan require that their administrators construe them in accordance with ERISA. (App., *infra*, 57a to 59a). According to the terms of both the NWP Plan and the Physicians Plan, a person is eligible to participate only if he or she is a "Qualified Employee". A "Qualified Employee" is defined by the NWP Plan, in relevant part, as "any employee of Employer". "Employer" is defined as NWP. The only exceptions to the term "Qualified Employee" are for (1) employees covered by a collective bargaining agreement that does not provide for participation in the plan; (2) for leased employees who are treated as employees for pension purposes solely because of I.R.C § 414 (n); and (3) for irregular service or on call physicians and any physician covered by an employment agreement that did not provide for participation in the plan. (App., *infra*, 58a to 59a). Similarly, the Physicians Plan defined the term "Qualified Employee" as any "employee of the Medical Group" with exceptions that are nearly identical to the NWP Plan. (App., *infra*, 56a). Neither plan specifically defines the term "Qualified Employee".

In June of 1995, petitioners submitted formal claims and demands for pension benefits to the administrators of the pension plans. On or about July 28, 1995, the NWP Plan

Administrator denied petitioners' claims for benefits under that plan. Similarly, on September 20, 1995, the Physicians Plan Administrator denied petitioners' claims for benefits brought under that plan. (App., *infra*, 6a). Petitioners sought review of the respective decisions of the Plan Administrators. (App., *infra*, 7a). The NWP Plan Committee affirmed the decision of the NWP Plan Administrator and the Physicians Plan Committee affirmed the decision of the Physicians Plan Administrator. In denying the petitioners claims, the respective Plan Administrators and/or Plan Committees[1] relied primarily on the conclusion that the petitioners were not employees of NWP, the plans' sponsor. The Administrators and/or Committees applied a "W-2" definition to the term employee, finding that because NWP does not and never has treated the petitioners as W-2 employees for Internal Revenue Service purposes, they were not eligible for pension benefits under the respective plans. (App., *infra*, 7a to 8a).

On behalf of themselves and approximately one hundred and fifty similarly situated individuals, Petitioners brought suit in the United States District Court for the District of Oregon seeking injunctive relief and a declaratory judgment that they were intitled to pension benefits pursuant to ERISA, 29 U.S.C. §§ 1001-1461. (App., *infra*, 8a). The district court had jurisdiction over this matter pursuant to 29 U.S.C. § 1132 (e) (1) and 28 U.S.C. § 1331. On May 2, 1997, the district court granted Petitioners' motion for class certification. Respondents moved for a determination that the arbitrary and capricious standard of review governed the district court's review of the administrators' decisions. After the close of discovery, the district court allowed Respondents' motion and adopted the arbitrary and capricious standard. (App., *infra*, 8a).

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[1] Reference in this petition to Plan Administrators is meant to encompass the Plan Committees as well.

The parties filed cross motions for summary judgment. On or about August 13, 1999, the district court granted Petitioners' motion and denied that of Respondents. (App., *infra*, 8a). The district court found that, if the Plan Committees committed legal error by employing an improper legal standard, then they abused their discretion (App., *infra*, 42a). The district court stated that a "reasonable interpretation by a plan administrator of an undefined term in the plan document must take into account whether the plan term has an accepted statutory or common law meaning." (App., *infra*, 41a). The court found that the term "employee" had such an established common law meaning and was hence not ambiguous. (App., *infra*, 42a). Since the pension plans at issue did not define the term in a manner that was contrary to the established common law definition, the court held that the Plan Committees had abused their discretion by ignoring "common legal principals" and applying the incorrect legal standard. (App., *infra*, 42a). The court stated that allowing the Plan Administrator to "supply any definition it sees fit" would make "a mockery of even the lenient arbitrary and capricious standard of review." (App., *infra*, 41a). It further held that defining "employee" merely as one who receives a W-2 form by the employer based upon its past practice was "an unwarranted abdication to the employer of the plan administrator's responsibility." (App., *infra*, 42a). The district court remanded the case to the Plan Committees for new determinations of the petitioners' eligibility for benefits under the common law definition of "employee". (App., *infra*, 43a to 44a). Respondents appealed this decision to the Ninth Circuit Court of Appeals.

On August 26, 1999, Petitioners filed a petition for attorney's fees and costs, which the district court granted on December 7, 1999, awarding Petitioners $159,547.02. Respondent's separately appealed from the order concerning attorney fees and costs. (App., *infra*, 9a). Both appeals were

consolidated by the Ninth Circuit, which had jurisdiction to review the decisions of the district court under 28 U.S.C. § 1291.

The Ninth Circuit reversed the decisions of the district court. The Ninth Circuit held, without distinguishing between factual and legal issues, that the arbitrary and capricious standard of review required the district court to give substantial deference to the administrators' decision to apply a "W-2" definition to the term employee, rather than its well established federal common law definition. (App., *infra*, 27a). The Ninth Circuit ruled, as a matter of law, that a plan administrator had discretion to interpret a term used, but not otherwise defined in a pension plan, in a manner which was inconsistent with its established federal common law meaning. (App., *infra*, 26a).[2]

REASONS FOR GRANTING THE WRIT

This case presents the court with an opportunity to clarify the standard of review applied by courts reviewing the legal decisions of ERISA plan administrators. The Ninth Circuit held that the court must defer to the administrators' choice of a legal standard to be applied in determining whether petitioners have employee status. This decision is in stark contrast to the decisions of other circuits, which have held either that (1) an administrators' legal decisions are not entitled to deference and may be judged by the court *de novo* or (2) that an administrator acts in an arbitrary and capricious manner when it commits an error of law.

The Ninth Circuit's decision also conflicts with the decisions of other circuits, which have held that, when an employee benefit plan does not contain a definition of

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[2] The Ninth Circuit reversed the district court's decision concerning attorney fees because its reversal of the district court's grant of Petitioners' motion for summary judgment meant that Petitioners were no longer prevailing parties. (App., *infra*, 29a).

employee, the common law definition is to be applied. In addition, the decision of the Ninth Circuit conflicts with a decision of a state court of last resort, the Supreme Court of New Hampshire, which held that pension plan administrators act in an arbitrary and capricious manner when they ignore common law factors defining the "employer–employee relationship" and make eligibility decisions solely on the basis of whether the alleged employer paid social security taxes for the employee in question.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE LACK OF DEFERENCE SHOWED BY OTHER CIRCUITS TO LEGAL CONCLUSIONS OF PLAN ADMINISTRATORS.

Although ERISA is a comprehensive statute, it nonetheless does not set out the appropriate standard of review for actions under § 1132(a) (1) (B) challenging benefit eligibility determinations. 29 U.S.C. § 1132(a) (1) (B). Thus, in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, this Court, incorporating the law of trusts, held that an ERISA plan administrators' eligibility determinations would normally be judged under a *de novo* standard of review, unless the plan gave the administrator discretionary authority to determine eligibility or to construe the terms of the plan. If, as in the case at bar, the plan documents confer such discretionary authority upon the administrator, eligibility decisions would be judged under an arbitrary and capricious standard.

Although *Firestone* has been "on the books" for twelve years now, this Court has not had occasion to delineate the precise scope of judicial review of the legal decisions of ERISA administrators. Numerous courts have held that, notwithstanding a grant of discretionary authority to a plan administrator by a plan document, *questions of law* under-

lying an administrator's eligibility determination are to be reviewed *de novo* by the court.

Thus, in *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990), the Fifth Circuit held that, under *Firestone*, legal questions were to be decided *de novo* by the court even though the plan gave the administrator discretion to interpret plan terms. The court stated that it owed no deference to the administrator's conclusions ". . . as to the controlling law. . ." *Id.* at 1100. The court held that the appropriate process of review was for the court to determine the *legally* correct interpretation of the plan and then to determine whether the plan administrators acted arbitrarily or capriciously in light of that interpretation. *Id.* at 1100. The court held that the question of whether an individual was an employee or an independent contractor in the ERISA context, was a legal question and it applied well-established federal common law standards in concluding that the plaintiff therein was, in fact, an independent contractor. *Id.* at 1101-02. In *Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606 (5th Cir. 1999), the Fifth Circuit cited *Penn* and repeated its holding that a plan administrators' statutory *and legal conclusions* were reviewed *de novo* even if the plan document afforded the administrator discretion to interpret plan provisions. *Id.* at 611.

Similarly, in *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987), the D.C. Circuit ruled that, although the arbitrary and capricious standard applied to a plan administrators' decision to deny benefits, the question of whether an individual was an employee was a question of law which should be decided by the court. The court held that, while it might defer to the plan administrators' findings concerning factual issues that were relevant to the legal question of employee status, it owed no similar deference to the administrators' ultimate legal conclusion in this regard. *Id.* at 1536, n. 31. *See also Weil v. Retirement Plan Admin. Comm. of Terson Co.*, 913 F.2d

1045, 1049 (2nd Cir. 1990), *affirmed in part and reversed in part on other grounds*, 933 F.2d 106 (2nd Cir. 1991) (despite a broad grant of discretionary authority to determine eligibility and to interpret plan documents under *Firestone*, the court owed no deference to the administrators' conclusions as to legal questions, which were reviewed *de novo*); *O'Neil v. Retirement Plan for Salaried Employees of RKO Gen.*, 37 F.3d 55, 62 (2nd Cir. 1997) (legal decisions of administrators owed no deference).

Other circuit court cases which hold that employee status under ERISA is a question of law include *Berger Transfer & Storage v. Central States Pension Fund*, 85 F.3d 1374, 1377-78 (8th Cir.1996) (while the existence and degree of each factor under the common law test is a question of fact, the ultimate conclusion to be drawn from those facts is a question of law); *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567, 571 (8th Cir. 1984) (a trustee acts in an arbitrary and capricious manner when he makes an erroneous legal conclusion concerning an individual's employee status); and *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 824 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981) (employee status under ERISA is question of law to be judged by common law standards).

Other courts have not spoken in terms of *de novo* review of legal issues, but have instead expressed the notion that plan administrators abuse their discretion or act arbitrarily and capriciously when they commit legal errors. Thus, in *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352-53 (9th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985), the Ninth Circuit described the deferential standard of review generally applicable to administrator decisions under ERISA as follows: ". . . decisions by the trustees will not be reversed unless they are arbitrary, capricious, made in bad faith, not supported by substantial evidence, or *erroneous on a question of law*."

(emphasis added). *See also Pratt v. Petroleum Production Management Inc., Employee Sav. Plan & Trust*, 920 F.2d 651, 657 (10th Cir. 1990); *Brown v. Retirement Committee of Briggs & Stratton Retirement Plan*, 797 F.2d 521, 525-26 (7th Cir. 1996), *cert. denied*, 479 U.S. 1094 (1987).[3]

Similarly, in *Vizcaino v. Microsoft*, 120 F.3d 1006, 1013 (9th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998), the court held that a denial of benefits under an ERISA plan was arbitrary and capricious because the denial was based upon legal errors which misconstrued the plan and applied a wrong legal standard to a benefits determination. In *Sandoval v. Aetna Life & Casualty Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992), the court stated: "In our view, both lack of substantial evidence and a mistake of law would be indicia of arbitrary and capricious actions and thus may be subsumed under the arbitrary and capricious label."

In these cases, the courts do not state that any particular deference is owed to the plan administrators' legal conclusions. They are thus consistent with the cases cited above: that, under the arbitrary and capricious standard, legal questions are nonetheless subject to independent review by the court, which owes no deference to the administrator's legal, as opposed to factual, conclusions.

The Ninth Circuit's decision in the case at bar signals a sharp break with this well-established legal authority. The Ninth Circuit has, in essence, ruled that the district court was required to give deference to the administrators' legal conclusion that it was not required to apply a common law definition of employee. The Ninth Circuit thus ruled that a

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[3] The Ninth Circuit has held that employee status is a mixed question of law and fact that is subject to a 'clearly erroneous" standard of review. *Professional and Executive Leasing, Inc. v. Commissioner*, 862 F.2d 751, 753 (9th Cir. 1988). This split with the many circuits that hold otherwise constitutes another compelling reason for this Court to grant review.

court could overturn an administrator's decision as to the correct legal standard to apply in judging employee status only if it was "so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case law or statute." (App., *infra*, 27a).

Under the Ninth Circuit's standard in the case at bar, an employee seeking to contest a plan administrator's legal conclusion would have to establish that the plan administrator's legal interpretation was *completely* lacking in authority in governing case law or statute. Such deference to the legal conclusions of a plan administrator would be qualitatively greater than any deference that an appellate court would show the legal conclusions of a trial court. Clearly, under the law of trusts from which this Court borrowed many of the principals espoused in *Firestone*, the courts were given authority to decide legal issues *de novo* and were not required to defer to the legal conclusions of trustees. Thus, in its review of common law trust principles in *Firestone*, this Court stated as follows: "The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation and not the rules that the trustee or his attorney believes to be applicable. . ." *Firestone Tire & Rubber*, 489 U.S. at 112. Clearly, plan administrators have no special expertise in the law and can not usurp the role of the courts to decide legal issues.

The Ninth Circuit's decision is at odds with the decisions of other circuits as well as its own decisions with regard to the appropriate standard of review of an administrator's legal conclusions. Review by this Court is necessary to establish uniformity within the circuits with regard to the appropriate standard of review under *Firestone*.

II. THE COURT'S DECISION THAT THE ADMINISTRATORS HEREIN HAD DISCRETION TO INTERPRET THE UNDEFINED TERM "EMPLOYEE" IN A MANNER INCONSISTENT WITH ITS WELL-ESTABLISHED FEDERAL COMMON LAW DEFINITION WAS ERRONEOUS.

The Ninth Circuit's decision herein gives plan administrators unfettered discretion to interpret undefined plan terms in any way they deem fit despite the fact that these terms have clear, well-established federal common law meanings. In this regard, the Ninth Circuit vastly expands the power of plan administrators and raises a formidable hurdle to employees who seek to obtain plan benefits.

The court's decision rewards plan administrators for obscurity in plan language and runs counter to fundamental purposes of ERISA. One of the fundamental purposes of ERISA is to provide clear and easily understood information to employees concerning the operation and administration of employee benefit plans. 29 U.S.C. §§ 1001,1021,1022. Another fundamental principle is that ERISA is to be liberally construed in favor of employees in order to foster the provision of pension benefits. *See e.g. Dade v. North American Phillips Corp.*, 68 F.3d 1558, 1562 (3rd Cir. 1995); *Bostic v. Ohio River Co. (Ohio Div.) Basic Pension Plan*, 517 F.Supp. 627, 630 (S.D. W. Va. 1981). Another important purpose is that the integrity and primacy of plan language be upheld by affording such language its plain and ordinary meaning. *Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997). The Ninth Circuit's decision undercuts each of these important purposes as it encourages the utilization of vague and undefined language as a means to give plan administrators virtually unfettered discretion to deny pension benefits to employees.

Petitioners do not contest the notion that plan administrators have the discretion to give meaning to an undefined plan term that does not have a well-established federal common law definition. However, where a crucially important term such as "employee" (which in many cases will be dispositive of a benefit eligibility decision) is left undefined and when the meaning of that term has a *clearly established* common law definition, plan administrators are not free to ignore it. Under such circumstances, there is simply no "ambiguity" for the administrators to interpret and they are bound to apply the federal common law definition.

The question of whether an employee benefit plan provision is ambiguous is a question of law that should be decided by the court *de novo*. *Gaines v. Amalgamated Insurance Fund.*, 753 F.2d 288, 290 (3rd Cir 1985). A contract, such as a pension plan, is ambiguous only if it reasonably susceptible to more than one construction. In ascertaining whether a contract is reasonably susceptible to more than one interpretation, words are to be given their plain and ordinary meaning as understood by a reasonable average person. *Central States, Southeast & Southwest Areas Pension Fund v. Independent Fruit and Produce Co.*, 919 F.2d 1343, 1350 (8th Cir 1990), *cert. denied*, 502 U.S. 811 (1991).

Petitioners herein contend that the plain and ordinary meaning of the term "employee" as used in an ERISA plan is, as a matter of law, the federal common law definition of that term as set forth by this Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992). In *Darden*, the Court applied the "well-established"principle of construction that "where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of those terms. . .". *Id.* at 322. *See also Neder v. United States*, 527 U.S. 1 (1999).

The Court in *Darden* stated that, under 29 U.S.C. § 1132(a), a "participant" in an employee benefit plan could sue to enforce his ERISA rights under said plan. A participant is defined under the statute as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). The term "employee" is defined as "any individual employed by an employer." 29 U.S.C. § 1002(6). *Darden*, 503 U.S. at 320-321. The Court found this definition of employee was "completely circular and explains nothing." *Id* at 323. The Court thus applied the federal common law test of agency, not the test of any specific state. *Darden,* 503 U.S. at 324, n.3. *See also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (the courts should, under a broadly preemptive federal statute, apply *federal* common law, not that of the states).

It is thus clear that an individual (other than a beneficiary or fiduciary as defined in the Act) has no right to file suit to enforce pension benefit rights under ERISA unless "employee" status under the federal common law "right-to-control test" is satisfied. *Darden,* 503 U.S. at 323. Petitioners recognize however that the terms of a pension plan may limit the classes of "employees" who are entitled to benefits. *See e.g. Shaw v. Delta Air Lines,* 463 U.S. 85, 91 (1983). Thus, it has been held that ERISA imposes two requirements for participant status. First, the plaintiff must prove status as an employee under the *Darden* test. Second, plaintiff must be, according to the language of the plan itself, an employee who is eligible to receive benefits. *Wolf v. Coca-Cola*, 200 F.3d 1337, 1340 (11th Cir 2000); *Clark v. E.I. Dupont De Nemours, Inc.*, 105 F.3d 646 (4th Cir 1997), *cert. denied*, 520 U.S. 1259 (1997).

Where the language of the plan does not itself set forth a definition that is inconsistent with the federal common law

definition as articulated in *Darden*, other circuits have seen fit to apply the common law definition. Thus, in *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d at 1101, the Fifth Circuit reviewed *de novo* the plan's determination that plaintiff was not an "employee" (under a plan which did not define that term and which conferred discretion upon the administrator to interpret its terms) and applied the common law test.

In *Coonley v. Fortis Benefit Ins. Co.*, 956 F. Supp. 841 (N.D. Ia. 1997), *aff'd* 128 F.3d 675 (8th Cir 1997), the court held that, where an ERISA plan does not define employee, ". . . it is reasonable to assume that the same definition as is applicable to who is an 'employee' under the ERISA statute would apply to who is an 'employee' under an ERISA plan." *Id.* at 856. The court stated that: "Where the parties intended some definition other than the one applied to 'employee' under the statute itself, that is, some definition other than that provided by federal common law, they were free to specify such a definition." *Id.* at 856.

In *Mayeske v. International Association of Fire Fighters*, 905 F.2d 1548, *cert. denied*, 498 U.S. 940 (1990), Justice Thomas, writing on behalf of a panel which included Justice Ginsburg, stated as follows:

> Since the plan does not define "employed by," we see no reason why the common-law definition of "employee," see *Holt*, 811 F.2d at 1538-40, should not control the question whether Mayeske was an "Employee" under the Staff Representatives' pension plan. *This conclusion creates a significant overlap between the employment status inquiry and the participation inquiry.*

Id. at 1557, n. 11 (emphasis added). This is precisely the argument being made by Petitioners herein.

In *Mayhew v. New England Teamsters and Trucking Industry Pension Fund*, 115 N.H. 581, 347 A.2d 610 (N.H. 1975), the New Hampshire Supreme Court similarly decided that pension plan administrators could not ignore the common law

definition of employee under a plan that did not define the term. In *Mayhew*, the plan gave the trustees unfettered discretion to determine eligibility questions. The court thus decided the denial of benefits decision under the arbitrary and capricious standard. The trustees interpreted the undefined term "employee" as used in the plan to mean individuals for whom the alleged employer paid social security taxes. Such a rule is similar, if not identical, to the "W-2" definition applied by the administrators herein. The court in *Mayhew*, citing *Scheuer v. Central States Pension Fund,* 358 F. Supp. 1332 (E.D. Wis. 1973), held that the trustees acted in an arbitrary and capricious manner by determining the employer-employee relationship merely on the payment or non-payment of social security taxes. The court stated:

> The failure of the pension fund agreement to include the common-law definition of employer-employee status does not permit the trustees to close their eyes to the true relationship. The rule of thumb adopted by the trustees delegated the decision to the employer whose self-interest dictated avoidance of the social security tax.

Mayhew, 347 A.2d at 611.[4]

The same statement can be made in the case at bar. The Ninth Circuit's decision means that plan administrators can, under a plan that does not define "employee", delegate to the employer (or plan sponsor) the decision as to who will or will not be eligible under the terms of the plan, regardless of the legal realities of the parties' relationship. As stated by the district court below, plan administrators can not abdicate their responsibility to determine who is or is not an "employee" merely by accepting the employer's designation. (App.,

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[4] Similarly, in *Reiherzer v. Shannon*, 581 F.2d 1266, 1272-73 (7th Cir. 1978), the court held that the trustees of an ERISA plan acted in an arbitrary and capricious manner when they determined that an individual was not employed within the meaning of the plan due to the fact that he paid his own federal taxes. *See also Wardle*, 627 F.2d at 825.

infra, 42a). If the trustees are not required to look beyond the employer's designation of the employee's status, the realities of the situation are thus never explored. Clearly, the wearing of such a blindfold is arbitrary and capricious.

The Ninth Circuit's decision that the Plan Administrators herein could deny benefits merely because the employer didn't require the employees to fill out a "W-2" form was based on three prior cases, none of which directly support this proposition. Thus, in *Administrative Committee of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson*, 164 F.3d 981(6th Cir. 1999), *cert. denied*, 528 U.S. 1114, (2000), the court held that the plan administrators had discretion to construe the term "partially terminated" as used in the plan. This case is clearly distinguishable, as this term does not have a well-established federal common law definition that has been endorsed by this Court, as does the term "employee". Similarly, in *Allen v. Western Conference of Teamsters Pension Trust Fund*, 788 F.2d 648 (9th Cir. 1986), the court merely held that, where a pension plan specifically defined the term "surviving spouse" as one who was married to the participant, California law regarding unmarried "putative" spouses could not be used to vary the term of that specific definition. *Allen* simply did not involve an undefined term of a pension plan that had a well-established *federal* common law meaning.[5]

Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan, 102 F.3d 1435 (7th Cir. 1996), while "closer to the mark", also does not afford plan administrators' the right to ignore the "right to control test" articulated by this Court in *Darden*. In *Trombetta*, the plan committee denied benefits after a careful consideration of all of the factors under *Darden*'s common law test, but placed great weight on

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[5] The Ninth Circuit recognized that neither *Allen* nor *Robinson* was directly on point. (App., *infra*, 24a to 25a).

the plaintiffs' execution of independent contractor agreements.[6] While plaintiffs argued that only the common law factors could be applied, the Seventh Circuit disagreed, holding that the trustees thoroughly considered and decided the case under the common law factors and were certainly allowed to consider the execution of the independent contractor agreements as well. *Id.* at 1440. The court's statement that nothing in ERISA compels a plan to use the term "employee" in the same way it was used in the statute was correct but was not particularly relevant as there was no indication that any other definition of the term 'employee' was being used by the trustees. *Id.* at 1440.

The Ninth Circuit's decision herein stands virtually on its own and is inconsistent with the decisions of other circuit courts of appeal (as well as the New Hampshire Supreme Court) both with regards to the deference it is willing to afford the legal conclusions of plan administrators and with regards to its willingness to allow plan administrators to supply a definition of the term "employee" that is inconsistent with its well established federal common law definition.

In essence, the Ninth Circuit's decision allows plan administrators to add conditions for benefit eligibility that are not present in the express terms of the plans themselves. Pursuant to the Ninth Circuit's reasoning, the plan administrators herein would be acting within the range of their discretion by denying benefits to an individual who met all of the standards for "employee status" under *Darden* simply because the employer chooses not to treat the individual as a "W-2" employee. A condition is thus being added: one has to be an "employee" who has *also* been asked to fill out a "W-2" form by his employer to be eligible for coverage under the

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[6] In the case at bar, although the Plan Committees paid "lip service" to the common law test, they made no findings concerning NWP's supervisory powers over petitioners and thus ignored the "right to control", the linchpin of the common law test. (App., *infra*, 31a to 32a).

plan. This in essence allows the employer to define eligibility even if it is clear beyond any doubt that the individual is an "employee" under the "right to control" test.[7]

Numerous courts have ruled that plan administrators act in an arbitrary and capricious manner when they deny benefits based on conditions for eligibility that are not set forth in the plan documents themselves. *Epright v. Environmental Resources Management, Inc.*, 81 F.3d 335, 342 (3rd Cir. 1996); *Ganze v. Dart Industries, Inc.*, 741 F.2d 790, 793 (5th Cir. 1984); *Maness v. Williams*, 513 F.2d 1264, 1267 (8th Cir. 1974). The case at bar does not involve a situation in which an administrator properly interprets ambiguous plan language. It is rather a situation where the plan administrator is grafting an additional unwritten requirement onto an unambiguous term that has a well-settled federal common law meaning.

The Ninth Circuit's decision herein also leads to absurd results. To have standing to sue under ERISA, a plaintiff must establish status as a statutory "employee" as defined in *Darden*. Once this burden is satisfied, plaintiff must establish that he is one of the class of employees who is entitled to benefits under the written terms of the plan. *Wolf*, 200 F.3d at 1337. Where the plan simply states that "employees" are entitled to benefits without defining the term, it makes no sense to hold that the test for eligibility under the plan is any different than would be the test for coverage under the statute.[8] If a plan sponsor wants the test for eligibility to be different, it certainly may draft plan language that contains a more restrictive definition than that of the statute itself. Since

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[7] Put another way, the Plan Administrators are adding another exclusion to the ones that are expressly set out in the plan documents, an exclusion for employees that are not required to sign W-2 forms by NWP. (App., *infra*, 56a, 58a to 59a).

[8] This was, in essence, the conclusion of Justices Thomas and Ginsburg in *Mayeske*, 905 F.2d at 1557, n.11.

the plans at issue herein do not contain such restrictive language and since the Plan Administrators are required to interpret the plans in light of ERISA, it is not up to them to supply additional restrictive language by interpretive fiat. The Plan Administrators' attempts to do so herein were, as the district court recognized, arbitrary and capricious.

CONCLUSION

For the above reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35936
D.C. No. CV-96-01166-JMS

SANDRA HENSLEY; JOHN WIEST, JR.; DONNA HOHNSTEIN; LINDA ONHEIBER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

NORTHWEST PERMANENTE P.C. RETIREMENT PLAN & TRUST, a defined contribution pension plan; NORTHWEST PERMANENTE P.C., an Oregon corporation; RETIREMENT PLANS COMMITTEE OF THE NORTHWEST PERMANENTE P.C. RETIREMENT PLAN & TRUST, an unincorporated association; PERMANENTE PHYSICIANS RETIREMENT PLAN FOR NORTHWEST PERMANENTE P.C., a defined benefit plan; ADMINISTRATIVE COMMITTEE OF PERMANENTE PHYSICIANS RETIREMENT PLAN FOR NORTHWEST PERMANENTE P.C., an unincorporated association,

Defendants-Appellants.

No. 99-35962
D.C. No. CV-96-011 66-JMS

SANDRA HENSLEY; JOHN WIEST, JR.; DONNA HOHNSTEIN; LINDA ONHEIBER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

NORTHWEST PERMANENTE P.C. RETIREMENT PLAN & TRUST, a defined contribution pension plan; NORTHWEST PERMANENTE P.C., an Oregon corporation; RETIREMENT PLANS COMMITTEE OF THE NORTHWEST PERMANENTE P.C. RETIREMENT PLAN & TRUST, an unincorporated association; PERMANENTE PHYSICIANS RETIREMENT PLAN FOR NORTHWEST PERMANENTE P.C., a defined benefit plan; ADMINISTRATIVE COMMITTEE OF PERMANENTE PHYSICIANS RETIREMENT PLAN FOR NORTHWEST PERMANENTE P.C., an unincorporated association,

Defendants-Appellees.

No. 00-35025
D.C. No. CV-96-01166-JMS

OPINION

SANDRA HENSLEY; JOHN WIEST, JR.; DONNA HOHNSTEIN; LINDA ONHEIBER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

and

KATE BURNHAM,

Plaintiff,

v.

NORTHWEST PERMANENTE P.C. RETIREMENT PLAN & TRUST, a defined contribution pension plan; NORTHWEST PERMANENTE P.C., an Oregon corporation; RETIREMENT PLANS COMMITTEE OF THE NORTHWEST PERMANENTE P.C. RETIREMENT PLAN & TRUST, an unincorporated association; PERMANENTE PHYSICIANS RETIREMENT PLAN FOR NORTHWEST PERMANENTE P.C., a defined benefit plan; ADMINISTRATIVE COMMITTEE OF PERMANENTE PHYSICIANS RETIREMENT PLAN FOR NORTHWEST PERMANENTE P.C., an unincorporated association,

Defendants-Appellants,

and

BANK OF CALIFORNIA NA, National Banking Association, trustee for Northwest Permanente PC Retirement Plan and Trust.; KATHLEEN HOLAHAN, M.D., Fiduciary for Northwest Permanente PC Retirement Plan & Trust; JAN COLLINS, MD, Fiduciary for Northwest Permanente PC Retirement Plan and Trust; NICHOLAS DEMORGAN, MD Fiduciary for Northwest Permanente PC Retirement Retirement Plan & Trust; CHRISTOPHER P. NELSON, MD,

Fiduciary for Northwest Permanente PC Retirement Plan and Trust; FRED M. NOMURA, Fiduciary for Northwest Permanente PC Retirement Plan & Trust; HARRY STATHOS, MD, Fiduciary for Northwest Permanente PC Retirement Plan And Trust; WILIAM WARD, MD, Fiduciary for Northwest Permanente PC Retirement Plan and Trust; ANN STENZEL, Fiduciary for Northwest Permanente PC Retirement Plan and Trust,

Defendants.

On appeal from the United States District Court
for the District of Oregon
Janice M. Stewart, Magistrate Judge, Presiding

Argued and Submitted
May 8, 2001—Portland, Oregon

Filed August 2, 2001

Opinion by Judge Greenberg;
Concurrence by Judge Rawlinson

OPINION

Before: ALFRED T. GOODWIN, MORTON L. GREENBERG,* and JOHNNIE B. RAWLINSON, *Circuit Judges.*

GREENBERG, *Circuit Judge*:

This matter comes on before this court on the appeal by Northwest Permanente P.C. ("NWP") and the related defendants from the district court's order for summary judgment reflecting its decision that NWP, as administrator for two

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* The Honorable Morton I. Greenberg, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

pension plans, abused its discretion in interpreting the term "employee" in determining that the plaintiffs, a group of nurse practitioners and physician assistants employed by the Kaiser Foundation Health Plan (the "Kaiser Health Plan"), an affiliate of NWP, were not eligible for pension benefits under the NWP plans. The plaintiffs cross-appeal from the district court's decision to apply an arbitrary and capricious standard of review to the administrators' determinations rather than reviewing them *de novo*. Finally, NWP appeals from the district court's order awarding attorney's fees to the plaintiffs predicated upon its conclusion, that the plan administrators had abused their discretion in interpreting the NWP pension plans. We affirm the district court's decision to apply an abuse of discretion standard, but reverse its decision that NWP abused that discretion in interpreting the pension plans. Accordingly, we also reverse the district court's award of attorney's fees to the plaintiffs.

I. BACKGROUND

NWP is a private corporation formed by a group of physicians to provide medical services to members of the Kaiser Permanente Medicare Care Program (the "Kaiser Program"). The Kaiser Program provides prepaid healthcare services to groups and individuals enrolled in the Kaiser Health Plan, a nonprofit qualified health maintenance organization, which provides administrative and financial services within the Kaiser Program. The Program fulfills its obligations to Kaiser members by maintaining an affiliate, Kaiser Foundation Hospitals ("Kaiser Hospitals"), to provide hospital facilities, and by contracting with independent groups of physicians "(Medical Groups") to provide medical services. The Kaiser Health Plan and Kaiser Hospitals are affiliates and share a common board of directors. The Medical Groups are separate entities that contract with the Kaiser Health Plan to provide medical services. The plaintiffs, a group of nurse practitioners and physician assistants, work for and receive their com-

pensation and retirement and health benefits from the Kaiser Health Plan. They work with NWP physicians and other health care professionals, essentially the Medical Groups.

NWP sponsors two pension benefit plans: the Northwest Permanente P.C. Retirement Plan and Trust (the "NWP Plan") and the Permanente Physicians Retirement Plan for Northwest Permanente P.C. (the "Physicians Plan"). We refer to these plans together as the "Plans." The NWP Plan is a defined contribution plan administered by a ten-person committee appointed by the NWP president. The Physicians Plan is a defined benefit plan administered by a ten-member committee comprised of physicians and employees of the Kaiser Health Plan and various Medical Groups. The committees do not include any nurse practitioners or physician assistants.

On December 22, 1994, the named plaintiffs anonymously tried to submit claims for benefits under the Plans. Following correspondence between counsel regarding the nature of the plaintiffs' claims, plaintiffs were informed on April 26, 1995, that for their claims to be considered, they would have to reveal their identities. On June 28, 1995, the plaintiffs revealed their identities and submitted to the respective Plan administrators a "formal claim and demand" for pension benefits.

On July 28, 1995, the NWP Plan administrator denied the plaintiffs' claim for benefits under that Plan. By letters dated September 21 and 22, 1995, the plaintiffs requested a hearing and review of the decision under the NWP Plan. Meanwhile, on September 20, 1995, the Physicians Plan administrator similarly denied the plaintiffs' claim for benefits. The plaintiffs did not immediately appeal from the Physicians Plan administrator's decision.

Thereafter, on November 3, 1995, the NWP Plan administrator granted the plaintiffs' request for a hearing and review

of the initial denial. The administrator's letter stated that the plaintiffs could "appear, with their attorneys, and submit evidence and arguments in support of their position" and "submit in advance of the hearing evidence and written arguments they wish to be considered prior to the hearing." The letter asked the plaintiffs to advise the NWP Plan administrator of any additional documents or information they wanted.

The plaintiffs did not request any additional information from the NWP Plan administrator, choosing instead, by letter dated November 27, 1995, to inform the administrator that they were withdrawing their request for a hearing and that they wanted a "final decision [to] be made upon this matter based on the record as it stands." The NWP Plan committee then reviewed the earlier decision, and on January 30, 1996, informed the plaintiffs that it was affirming the administrator's decision.

Then, on June l 1, 1996, the plaintiffs requested review of the Physicians Plan administrator's decision, submitting with their request additional evidence and argument. Thereafter, the Physicians Plan committee affirmed. the administrator's decision denying the plaintiffs benefits.

In denying the plaintiffs' claims, both Plan administrators relied primarily on the conclusion that the plaintiffs were not "employees" of NWP, the Plans' sponsor. According to the terms of both Plans, a person is eligible to participate only if he or she is a "Qualified Employee." A "Qualified Employee" is defined by the NWP Plan, in relevant part, as "any employee of Employer." "Employer" is defined as NWP. Similarly, the Physicians Plan defines a "Qualified Employee," in relevant part, as "any employee of the Medical Group." The "Medical Group" is defined as NWP. Neither Plan specifically defines "employee," an omission that gave rise to the plaintiffs' claim. The administrators applied a "W-2" definition to the term, finding that because NWP does

not and never has treated the plaintiffs as W-2 employees for Internal Revenue Service purposes, they were not eligible for benefits under the Plans.

On behalf of themselves and approximately 150 similarly situated individuals, plaintiffs brought suit seeking injunctive relief and a declaratory judgment that they were entitled to pension benefits under the two Plans pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461.[1] On May 2, 1997, the district court granted the plaintiffs' motion for class certification.[2] The defendants then moved for a determination that the arbitrary and capricious standard of review governed the district court's review of the administrators' decisions. The district court initially stayed the defendants' motion pending the completion of limited discovery and thereafter denied the motion without prejudice pending completion of the additional discovery on the issue. Following discovery, the defendants renewed their motion which the district court granted, adopting the arbitrary and capricious standard.

Then, the parties filed cross-motions for summary judgment. In an Opinion, Order and Judgment dated August 13, 1999, the district court granted and denied each motion in part. The court vacated the administrators' decisions that the plaintiffs were not "employees," reasoning that they had' abused their discretion in applying the W-2 definition of

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[1] The plaintiffs also raised breach of fiduciary duty claims against various members of the administrative committees in their individual capacities, and sought injunctive relief against the Bank of California, the trustee of funds for one of the Plans. On January 16, 1997, the district court granted the defendants' motion to dismiss the breach of fiduciary duty claims and consequently all individual defendants were dismissed from the case. The district court also dismissed the Bank of California as a party of no interest.

[2] All parties consented to allow a magistrate judge enter final orders and judgments in this case in accordance with Fed. R. Civ. P. 73 and 28 U.S.C. § 636(c).

employee. The court remanded the case to the Plan administrators for a new determination of the plaintiffs' eligibility for benefits under the common law definition of "employee." The defendants then appealed to this court on September 13, 1999. Thereafter, on September 23, 1999, the district court granted the defendants' Motion for Stay of Administrative Remand Proceedings Pending Appeal and, on that day, the plaintiffs cross-appealed.

In the meantime, on August 26, 1999, the plaintiffs filed a petition for attorney's fees and costs, which the district court granted on December 7, 1999, awarding the plaintiffs $159,547.02 in fees and costs. Defendants then separately appealed from that order.

II. JURISDICTION

The district court had jurisdiction over this ERISA matter pursuant to 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331. It is not clear, however, that we have jurisdiction inasmuch as the district court, after concluding that the Plan administrators abused their discretion by applying an incorrect legal standard, rather than completing the disposition of the case, remanded it to the Plan administrators for redetermination of the plaintiffs' eligibility for benefits.

With exceptions not germane here, courts of appeals have jurisdiction solely over appeals from "final decisions of the district courts of the United States." 28 U.S.C. § 1291. A final decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. *United* States, 324 U.S. 229, 233, 65 S. Ct. 631, 633 (1945). The issue with respect to our jurisdiction thus becomes whether the district court's remand order is appealable as a final decision under section 1291.

We twice have addressed the question of whether district court orders remanding ERISA determinations to administrators in circumstances somewhat similar to those here are

appealable. The first time, in *Snow v. Standard Insurance Co.*, 87 F.3d 327, 329 (9th Cir. 1996), *overruled on other grounds by Kearney v. Standard Insurance Co.*, 175 F.3d 1084 (9th Cir. 1999) (en banc), the district court remanded the case to the ERISA plan administrator for further evidence development even though the court had addressed the merits of the matter and concluded that there was evidence to support the plan administrator's decision. In our opinion we stated, without discussion, that we had jurisdiction pursuant to section 1291. *Id.* at 330. We held that the district court erred in remanding the matter and thus we reversed its judgment and remanded the case to the district court to make an "ultimate decision based on the record" already compiled. *Id.* at 333.

The second time, in *Williamson v. Unum Life Insurance Co. of America*, 160 F.3d 1247, 1252 (9th Cir.1998), we analyzed the jurisdictional issue in an action seeking payments on a disability policy and concluded that we were without jurisdiction. There, the plaintiff sued the plan administrator seeking to recover benefits that the administrator terminated because it claimed that the plaintiff did not cooperate with it by providing documentation regarding her continued disability. *See Id.* at 1249. The plan administrator first filed a motion seeking a partial summary judgment declaring that the district court would apply an abuse of discretion standard in reviewing the administrator's decisions. *See id.* The district court denied the motion and *sua sponte* granted partial summary judgment in favor of the plaintiff determining that *de novo* review was the proper standard. *See id.* Thereafter, the administrator filed a second motion for summary judgment, arguing that it was entitled to terminate benefit payments because the plaintiff failed to cooperate with it as required by the policy. *See id.* at 1250. The district court also denied that motion, instead remanding the matter to the administrator to supplement the record and make a determination as to the plaintiff's disability. *See id.* The plan

administrator then appealed from the district court's two orders. *See id.*

On appeal, we concluded that, absent special circumstances, orders granting partial summary judgment are not appealable final orders pursuant to section 1291. *See id.* Finding no special circumstances in the case, we dismissed the appeal. *See id.* In doing so, we distinguished *Snow* by finding that the district court in *Williamson* only granted partial summary judgment, never addressed the merits of the plaintiff's claim, and never entered a final judgment pursuant to Fed. R. *Civ. P, 58. See id.* at 1252.

Just as *Snow* is distinguishable from Williamson, Williamson is distinguishable from this case. Here, the defendants' appeal arises from the district court's decision on a dispositive summary judgment motion directly implicating fundamental eligibility decisions under the Plans. Further, in the process of disposing of the parties' cross-motions for summary judgment, the district court entered judgment in favor of the plaintiffs requiring the Plan administrators to revisit their initial decisions. In *Williamson* the district court did not make any such decision as *it* simply remanded the matter to the plan administrator to supplement the record "and make a determination of whether Plaintiff continued to be disabled from the time her benefits were suspended to the present," *id.* at 1250, so as to be eligible for benefits. The administrator in *Williamson*, of course, unlike the administrators here who rejected plaintiffs' claims on the merits, never had addressed the plaintiff's claim on the merits, as the *Williamson* administrator predicated its rejection of the claim on the procedural ground that the plaintiff failed to cooperate with it as the policy required.

Although *Williamson* is distinguishable, as are opinions by other courts addressing similar issues, in *Williamson* we drew a useful analogy between a district court order remanding a case to an administrative agency and an order remanding a

case to an ERISA plan administrator. *See Williamson*, 160. F.3d at 1251; *see also Rekstad v. F'irst Bank Sys., Inc.*, 238 F.3d 1259, 1262 (10th Cir. 2001); *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 979 (7th Cir.1999). An order remanding a case to an administrative agency "is appealable only when: (1) the district court order conclusively resolve[d] a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." *Williamson, 160* F.3d at 1251 (quoting *Rendleman v. Shalala*, 21 F.3d 957, 959 n.1 (9th Cir. 1994)) (internal quotation marks omitted). The Williamson court found that none of the above factors were met in that *case. See id.*

Here, however, the *Rendleman* formulation is satisfied. First, the district court conclusively decided a separable legal issue, namely, the criteria for determination of who is an "employee" that the Plan administrators were required to apply in interpreting the pension plans. Second, if the district court had erred in requiring the Plan administrators to apply the common law definition of employee, then the district court's order would have forced the Plan administrators to apply an erroneous rule. This application could have resulted in a wasted proceeding if the Plan administrators adhered on remand to their conclusion that plaintiffs were not employees. Third, if the defendants could not appeal here, as a practical matter under the possible scenarios that could develop on the remand, the Plans might be precluded from obtaining review of the district court's decision.

With respect to possible outcomes on the remand, we point out the following. In one possible outcome, the administrators could conclude that the plaintiffs are not "employees" under a common law definition. The plaintiffs then could file suit again, but they likely would argue only that application of the

common law definition of employee requires that they be deemed employees. In that scenario it is doubtful that the Plan administrators would be able to seek to set aside their own decision, and thus they might not be able to challenge the district court's order requiring them to apply the common law definition.

In the second possible outcome, the administrators could conclude that the plaintiffs are employees under a common law definition. The plaintiffs would not challenge this decision and, again, it is questionable whether the Plan administrators then could challenge their own decision. While the Plan sponsor potentially could challenge the way the administrators applied the common law definition, if the district court agreed with the sponsor that the administrators had erred, review of the issue of whether the administrators had erred in applying a W-2 definition of the term "employee" would be precluded. As far as we can see, only if the Plan sponsor sued and the district court upheld the administrators' decisions is it likely that the W-2 issue could be revisited.[3]

Applying the *Rendelman* factors cited *in Williamson,* and given that appellate jurisdiction is necessary to ensure proper review of an important legal question which a remand may make effectively unreviewable, we conclude that the district court's order constituted a final appealable order so that we have jurisdiction pursuant to section 1291.

III. STANDARD OF REVIEW OF ADMINISTRATORS' DECISIONS

We review *de novo* the district court's choice and application of the standard of review applicable to decisions by

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[3] We recognize that when a court tries to foresee possible outcomes of litigation in complicated situations its opinion necessarily will have a certain speculative quality to it. Nevertheless, we think that consideration of the third *Rendelman* criterion makes it appropriate for us to contemplate what would be the future course of this litigation if we dismiss this appeal.

ERISA plan administrators. *See Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc.*, 125 F.3d 794, 797 (9th Cir. 1997); *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1471 (9th Cir. 1993).

Although ERISA establishes a right to judicial review of benefits decisions, the statute does not set forth the appropriate standard of review for such determinations. But in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948 (1989), the Supreme Court addressed the issue. There, the Court held that a court should review a denial of benefits challenged pursuant to 29 U.S.C. § 1132(a)(1)(B) *de novo* "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115, 109 S. Ct. at 956-57. The Court recognized, however, that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'"[4] *Id.* at 115, 109 S. Ct. at 957 (quoting Restatement (Second) of Trusts § 187, Comment d (1959)).

In cases in which the beneficiary alleges that the administrator has a conflict of interest, we follow a two-part test to determine whether to use a heightened level of scrutiny in reviewing the administrator's benefits decisions.[5] *See*

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[4] Our opinions use the phrases "arbitrary and capricious" and "abuse of discretion" interchangeably. Compare *Eley v. Boeing Co.*, 945 F.2d 276, 278-79 (9th Cir.1991), with *Dytrt v. Mountain State Tel. & Tel. Co.*, 921 F.2d 889, 894 (9th Cir. 1990). Any difference between the two standards, however, is in name *only*. *See Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1321 n.1 (9th Cir. 1995).

[5] In analyzing this issue, the district court devoted significant attention to what another district court had determined to be an inconsistency in our approach to conflict of interest cases, citing *Palmer v. Univ. Med. Group*, 994 F. Supp. 1221, 1232 (D. Or. 1998). In *Palmer*, the court found that some panels of this court have assumed that there were certain situations in which the administrator inherently was conflicted and therefore the

Atwood v. Newmont Gold Co., 45 F.3d 1317, 1323 (9th Cir. 1995). As we stated in *Atwood*:

> First, we must determine whether the affected beneficiary has provided material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations to the bene-

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court automatically applied a heightened level of scrutiny, the level of which depended on the circumstances of the case. *See Palmer*, 994 F. Supp. at 1232; *see also Barnett v. Kaiser Found. Health Plan*, 32 F.3d 413, 416 (9th Cir.1994); Taft, 9 F.3d at 1474; *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1325 (9th Cir. 1992); *Jung v. FMC Corp.*, 755 F.2d 708, 71112 (9th Cir.1985). In contrast, other panels have adopted a burden-shifting approach which requires the plaintiff to present proof that the administrator's decision actually was tainted by conflict, which, only if unrebutted by the plan administrator, would result in the application of the *de novo* standard. *See Palmer*, 994 F. Supp. at 1232; *see also Snow*, 87 F.3d at 331; *Atwood*, 45 F.3d at 1323. To resolve this apparent conflict, *the Palmer* court drew a distinction between ERISA cases dealing with "discretionary policy decisions," where the administrator's motive was found to be highly relevant, and those cases involving "benefits determinations," where the focus should be on the merits of the decision rather than the motives of the parties. *See Palmer v. Univ. Med Group*, 973 F. Supp. 1179, 1189 (D. Or. 1997). The court found that the case before it involved discretionary policy decisions. *See id.*

The distinction drawn by the Palmer court of this court's analyses, however, is nonexistent. The *Palmer court* cited several cases that stated, generally, that because there was a conflict of interest, the court would apply a more stringent version of the abuse of discretion standard. The court interpreted this language to mean that those courts had adopted a slidingscale approach. In Atwood, however, we interpreted those same cases and found they left open the question of "in what way this lesser degree of deference actually alters [the court's] review." *Atwood*, 45 F.3d at 1322. We answered this open question by adopting the two-step analysis, one that we since consistently have applied. *See, e.g., Friedrich v. Intel Corp.*, 181 F.3d 1105, 1109 (9th Cir. 1999); *Lang*, 125 F.3d at 798; *Snow*, 87 F.3d at 331. Therefore, notwithstanding the district court's concerns, the *Atwood* two-step analysis is the controlling law which we will apply in this case.

> ficiary. If not, we apply our traditional abuse of discretion review. On the other hand, if the beneficiary has made the required showing, the principles of trust law require us to act very skeptically in deferring to the discretion of an administrator who appears to have committed a breach of fiduciary duty.

Id. In the latter circumstance, the plan must rebut the presumption by producing evidence to show that the conflict of interest did not affect its decision to deny or terminate benefits. *See Lang, 125* F.3d at 798. Should it fail to carry its burden, the court's review is *de novo* "'without deference to the administrator's tainted exercise of discretion.'" *Id.* (quoting *Atwood*, 45 F.3d at 1323).

The plaintiffs, in their cross-appeal, contend that the district court erred in applying the arbitrary and capricious standard of review to the Plan administrators' decisions. They allege that there were conflicts of interest inherent in the administrators' decisionmaking process warranting application of the *de novo* standard of review. The parties do not dispute that both Plans give their respective administrators plenary discretion to interpret their terms and make eligibility determinations. Therefore, the district court's review should have been for abuse of discretion unless the plaintiffs proffered unrebutted evidence that the Plan administrators were operating under a conflict of interest.

Turning first to the NWP Plan, the plaintiffs argue that the administrators were operating under a pecuniary conflict in that NWP's financial performance would be affected detrimentally through its funding of the NWP Plan if the plaintiffs were entitled to benefits under the Plan. More specifically, all ten current members of the NWP Plan committee are NWP employees and all but two are NWP physicians. A majority of the NWP Plan committee members are also shareholders of NWP, as are most of the physicians it employs. The plaintiffs allege that the annual financial performance of

NWP can affect salary levels for NWP employees, including whether bonuses and dividends are paid. Therefore, "each of the shareholder members of the NWP Plan Committee had a personal pecuniary interest in the outcome of their decisions, because their salaries, bonuses and dividends are driven in whole or in part by NWP's financial performance." Cross-Appellants' Br. at 21-22. To this end, the plaintiffs proffered evidence that if NWP had approved their claims, the potential negative impact on NWP would be approximately $400,000 to $2,700,000, depending on net revenue, with a materiality threshold of $505,000 for 1995 and 1996.

We have recognized that there is at least an apparent conflict of interest where, as here, a plan administrator is also the plan's funding source. *See Friedrich v. Intel Corp.*, 181 F.3d 1105, 1109 (9th Cir. 1999); *Lang*, *125* F.3d at 797. The relevant inquiry under *Atwood*, then, is whether the plaintiffs proffered material, probative evidence tending to show that the NWP Plan administrator's self-interest caused a breach of its fiduciary obligations. We have held that a plan administrator's failure to follow its internal procedures for denying benefit claims is evidence that the administrator acted because of a conflict of interest. *See Friedrich*, 181 F.3d at 1110 (concluding plaintiff showed conflict of interest where there were procedural irregularities in initial claims process and unfair appeals process). Further, inconsistencies in a plan's handling of a benefits claim has been held to constitute evidence that the administrator's decision was tainted by self-interest. *See Lang*, 125 F.3d at 798-99 (finding plaintiff proffered sufficient evidence where plan administrator offered differing and inconsistent reasons for denial of benefits).

The plaintiffs contend that "[t]here was substantial evidence of an actual conflict of interest." Cross-Appellants' Br. at 21. In their brief, however, they cite to very little to support this claim and principally instead restate the con-

clusory allegation that because the NWP Plan administrator had a financial stake in the outcome of the eligibility determination, the administrator had a personal pecuniary conflict of interest.

It is true that they also point to alleged procedural irregularities that in their view demonstrate that the NWP Plan administrator was operating under a conflict. However, we are satisfied that their claim is not substantiated. For instance, the plaintiffs contend the review of the initial benefits determination was improper because Stoel Rives, the law firm representing the Plan, drafted the letter affirming the administrator's prior decision. They argue this indicates that the decision was not a product of a decision by the NWP Plan administrator, but was instead the result of improper influence from counsel. The district court found there was no evidence that the NWP Plan administrator breached its fiduciary role inasmuch as there was testimony from a NWP Plan committee member that he had input into the letter's drafting, the committee was informed of the issues surrounding the benefits decision and the letter at a meeting that lasted several hours, and the committee therefore was free to reject the letter and reach a different conclusion, but decided not to do so. Put simply, there was no evidence that this decisionmaking process was abnormal for the NWP Plan administrator.

The plaintiffs also contend the administrator's determinations were tainted by a statement by Ann Stenzel, the Director of Pensions and Benefits for NWP, that the Physicians Plan administrator was going to deny the plaintiffs' claim. Because NWP "worked closely" with the Physicians Plan committee, the plaintiffs contend "improper influences came to bear on the process." As the district court found, however, there is no evidence that this statement influenced the NWP Plan administrator in any way so as to render its decision procedurally

flawed. The NWP Plan committee was still free to make its own decision, and there is no indication it did not.[6]

The plaintiffs set forth nothing on this appeal to warrant our reaching a different conclusion. Without any evidence that the NWP Plan administrator engaged in any irregular procedural conduct in handling the claims, and given the fact that the administrator consistently denied the claims because the plaintiffs were not "employees" of NWP, we affirm the district court's decision to adopt the abuse of discretion standard in reviewing the NWP Plan administrator's decision.

Turning next to the Physicians Plan, the plaintiffs contend the administrator denied their claims because of a systemic conflict of interest. More specifically, the Physicians Plan committee was comprised of employees of the Kaiser Health Plan and of various Medical Groups similar to NWP around the country. In addition to the Physicians Plan, the Physicians Plan committee administers several other benefit plans within the Kaiser Program. Because the Kaiser Health Plan operates in approximately eleven states, contracting with thirteen different medical groups, "[t]he issues raised by

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[6] In addition to the foregoing argument, the plaintiffs claimed in the district court that Stenzel, rather then the NWP Plan administrator, made the initial determination to deny benefits. They claimed Stenzel had no authority to make such decisions, and that the decision actually may have been made by attorneys for NWP from Stoel Rives, whom Stenzel consulted in making the determination.

The district court found, however, that Stenzel had the authority under the Plan's terms to make initial benefits determinations. Further, the court found that it was not improper for Stenzel to consult outside counsel and that despite evidence that Stoel Rives may have been operating under a conflict in that it represented both the employer and the fiduciary, and it consulted with counsel for the Physicians Plan, there was no evidence that any conflict influenced the benefits decision. *See Ashenbaugh v. Crucible, Inc. 1975 Salaried Ret. Plan,* 854 F.2d 1516,1531-32 (3d Cir. 1998). The plaintiffs do not appear to challenge this finding on appeal which in any event is not assailable.

plaintiffs' claims could have significance for several of the medical groups." Essentially, the plaintiffs argue the Physicians Plan administrator denied their claims to prevent a "snowball" effect in the other plans on a nationwide scale.

In support of their position, the plaintiffs proffer a statement in a letter to the Physicians Plan committee members that reads, "as this is an issue which could have significance for several of the medical groups, we have been working closely with [NWP] and outside counsel in evaluating and monitoring these claims." Cross-Appellants' Br. at 25. Further, they claim there were procedural irregularities in that the Physicians Plan committee never met to discuss the plaintiffs' claim. They assert that instead, Ellen Canter, an individual they contend did not have the authority to make the decision, made the initial decision denying the plaintiffs' claim. Finally, they claim that there were irregularities in the decision to deny the plaintiffs' claim on review because the committee made its determination using ballots that simply asked whether the committee members "agreed" with the decision to deny benefits.

The plaintiffs' proffer is insufficient. First, the record does not support the plaintiffs' allegation that an individual without the authority to do so made the initial decision regarding benefits. Although Canter is not a member of the Physicians Plan committee, the committee properly delegated to her the authority to act on its behalf. With regard to delegation of certain fiduciary duties the Physicians Plan states:

> Each Committee may allocate and delegate any of its duties (other than trustee responsibilities as defined by ERISA) to subcommittees comprised of Committee members, or to any person or persons, which may include or be limited to Committee members. No person has any discretionary authority in connection with the Plan or Plan Assets unless properly delegated.

Furthermore, the Plan provides that "[e]ach Committee establishes procedures for carrying out its duties and powers and keeps records of its proceedings, acts, and other data necessary to administer the Plan." Although the defendants did not produce documentary evidence showing the delegation of authority from the Physicians Plan administrator to Canter, affidavits from her and Kirk E. Miller, a Physicians Plan committee member, stated that the committee for several years had delegated to Canter the authority to make initial claim determinations. Finally, nothing in the Physicians Plan requires that the delegation be in writing. Therefore, rather than demonstrating that there had been a procedural irregularity, the record establishes that the procedure leading to the initial benefits determination was entirely consistent with the Physicians Plan's normal operating procedures.

Second, the record simply does not support the claim that there were irregularities in the review of the initial decision. The Physicians Plan authorizes the committee to "act in writing without a meeting." Therefore, it was not improper to use ballots to make the benefits decision. Further, the plaintiffs are incorrect in implying that the ballots gave the committee members only one choice. In actuality, the ballots offered two choices: (1) "I agree that the Claimants request for benefits under the [Physicians Plan] for [NWP] should be denied" and (2) "I believe that the Claimants request for benefits under the [Physicians Plan] for [NWP] should be approved." Therefore, again there is no evidence of a procedural defect in the committee's decision.

Finally, while the statement to the Physicians Plan committee members that their decision could have significance for several other Medical Groups is probative, it alone does not establish the committee acted out of a conflict of interest. Indeed, there is no evidence that this statement affected the members' decisions in any way.

Therefore, we conclude that the plaintiffs failed to proffer material, probative evidence, beyond the mere fact of the apparent conflict, tending to show the two committees' alleged self-interest caused them to breach their fiduciary obligations. Accordingly, we affirm the district court's application of the arbitrary and capricious standard of review to the Plan administrators' decisions.

IV. DEFINITION OF EMPLOYEE

Having concluded that the district court correctly decided to review the plan administrators' decision for abuse of discretion, we now consider the merits of that review. In reviewing the district court's order on a motion for summary judgment, we review *de novo* whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52, 106 S. Ct. 2505, 2510-12 (1986). We draw all reasonable inferences in favor of the non-moving party. *See id.* Additionally, we review a district court's review of an ERISA plan administrator's decision *de novo. See Canseco v. Construction Laborers Pension Trust,* 93 F.3d 600, 605 (9th Cir. 1996); *Snow*, 87 F.3d at 331.

NWP contends that the district court erred in ruling that the Plan administrators abused their discretion by utilizing a W-2 definition of employee, rather than adopting a federal common law definition of the term. On ruling on NWP's motion for summary judgment, the district court characterized the issue as "whether by construing the term 'employee' as a W2 employee, the [administrators] committed legal error," for "[i]f the [administrators] committed legal error by employing an improper legal standard, then they abused their discretion." The court ruled that the term "employee" has a well-established common law meaning that the Supreme Court articulated in *Nationwide Mutual Insurance Co. v. Darden,* 503 U.S. 318, 323-24, 112 S. Ct. 1344, 1348 (1992). There-

fore, its meaning is not ambiguous and the administrators did not have discretion to apply their own definition. Thus, the court ruled that by applying a W-2 definition, the administrators committed legal error, and accordingly abused their discretion.

Our determination of whether the district court's decision was correct turns on whether, as a matter of law, a term used, but not otherwise defined, by an ERISA pension plan that has an established federal common law meaning is unambiguous so that a plan administrator has no discretion to interpret its meaning. Neither the district court nor the plaintiffs cite to any cases supporting this position. Indeed; analogous case law suggests that merely because a term has a common law definition it is not unambiguous, so that an administrator is precluded from exercising discretion in its interpretation.

Thus, in *Allen v. Western Conference of Teamsters Pension Trust Fund*, 788 F.2d 648, 650 (9th Cir. 1986), we upheld the denial of benefits to *a surviving spouse* even though the plan administrator's definition of a plan term conflicted with its established definition. In *Allen,* following her husband's death, the plaintiff sought survivor benefits under his pension plan to which she would have been entitled had she been a "surviving spouse" under the terms of the plan. *See id.* at 649. The term "surviving spouse" was defined as "the person to whom the Vested Participant or Pensioner was married on the date of his death and throughout the one-year period ending on his death." *Id.* The plan administrator interpreted this definition to require that the surviving spouse actually have been married to the participant, construing marriage strictly to require a legal marriage relationship. *See id.* Unfortunately, although the plaintiff and the pensioner had a civil wedding ceremony and lived as husband and wife until the pensioner's death, because the decedent's prior marriage was not final at the time they were married, the marriage was void. *See id.*

The plaintiff argued, pursuant to California statutory law, that she was entitled to benefits as a "putative spouse." *See id.* California law provides that where a marriage is void or voidable, but one or more of the spouses believed it to have been valid, a court may award the party the status of putative spouse. *See id.* This status has been held to entitle the spouse to: treat marital property as community property; receive workers' compensation benefits; take by intestacy; sue for wrongful death; and claim death benefits under a public employees' benefit plan. *See id.* Therefore, the plaintiff contended that she should be treated as a surviving spouse for the purposes of the pension plan. *See id.* The court rejected this argument, however, finding no authority for the proposition that putative and legal spouses must be treated the same for all purposes. *See id.* Because of this, and because the pension plan used the term "married," the express terms of the plan governed. *See id.* at 650. The court therefore held that the denial of benefits was proper. *See id.*

While not directly on point here, *Allen* nevertheless is instructive as to our approach in analyzing an administrator's interpretation of a plan term in the face of a contrary legal definition. *Allen* demonstrates that the decision of the plan administrator to apply its own definition may be upheld although state law in effect defines the disputed term differently.

The Court of Appeals for the Sixth Circuit's opinion in *Administrative Committee of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson*, 164 F.3d 981, 986 (6th Cir. 1999), *cert. denied*, 528 U.S. 1114, 120 S. Ct. 931 (2000), which held that a plan administrator had the discretion to interpret and construe an undefined term in the plan, also is instructive. There, the plaintiffs sought *de novo* review of the administrator's interpretation of the term "partially terminated," as they argued that, as a matter of law, a court rather than the administrator should provide the

determination of its meaning. *See id.* The court rejected this argument finding that because the plan granted discretion to the administrator, the "discretion to interpret and construe the Plan logically extends to terms of the Plan, since any interpretation of a plan turns on the meaning of terms contained therein." *Id.* In doing so, it noted that "[t]o limit an administrator's discretion to only those terms explicitly defined [by the plan] would undermine the administrator's discretionary power or require companies to write interminably long plans to account for every term." *Id.*

While the issues presented are not identical, we nevertheless find the *Robinson* analysis persuasive. Although arising in the context of the appropriate standard of review in considering the plan administrator's decision, the *Robinson* plaintiffs made a similar claim to that which the plaintiffs here put forth; that the court, rather than the plan administrators, should define an undefined plan term. But, as the *Robinson* court held, if the courts limited an administrator's discretion to the interpretation of defined terms, they would frustrate the discretionary power expressly conferred on the administrator by the plan. We should avoid such an inappropriate result here even though the plaintiffs urge us to require the Plan administrators to adopt a definition set forth by the Supreme Court rather than a definition we or the district court supplies. Regardless of which court's definition is used, if we required the Plans to use a judicially-crafted definition, we would be inappropriately depriving the administrators of their discretion to interpret the Plans.

We emphasize that there is nothing in the language of the Plans limiting the administrators' discretion to the interpretation of defined terms. To the contrary, the Plans expressly provide that their respective administrators have "absolute" or "sole discretion" to interpret the terms of the Plan and to determine eligibility for benefits under the Plan. Second, there is nothing in *Darden* from which we can con-

clude that the Supreme Court meant its definition of "employee" to apply to all ERISA plans where the term otherwise was undefined. The Court simply construed the term "employee" as it is used in ERISA for the purpose of determining who has standing to sue under section 1132(a). *See Darden*, 503 U.S. at 320-21, 112 S. Ct. at 1347. In doing so, the Court did not indicate that an administrator need apply this definition in interpreting individual ERISA plans. Indeed, as the Court of Appeals for the Seventh Circuit has recognized, "[n]othing in ERISA . . . compels a plan to use the term 'employee' in the same way it is used in the statute." *Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership* Plan, 102 F.3d 1435, 1440 (7th Cir.1996) (internal quotation marks omitted). Instead, ERISA contemplates that there will be plans that do not cover all categories of employees, a strong indication that the terms do not have to be construed the same way. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S. Ct. 2890, 2896-97 (1983) ("ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits.").

Therefore, we find that the district court erroneously concluded that, in the absence of a definition in the Plans, the administrators were required, as a matter of law, to apply the federal common law definition of employee. Rather, plan administrators should be given the full benefit of the discretion afforded to them by their respective plans in interpreting plan terms, be they defined or undefined, with the reasonableness of those interpretations being evaluated against the relevant factual and legal backgrounds.[7]

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[7] To this end, we note the district court's concerns that "allowing the plan administrator to supply any definition it sees fit, [would cause] the plan administrator [to] rarely, if ever, commit an abuse of discretion . . . [and] make a mockery of even the lenient arbitrary and capricious standard of review" are unfounded. While we hold that administrators have

The relevant inquiry then becomes whether the definition applied by the administrators was arbitrary and capricious. The arbitrary and capricious standard of review requires the district court to give substantial deference to an administrator's decision. Indeed, an administrator's decision "is not arbitrary unless it is not grounded on any reasonable basis." *Horan v. Kaiser Steel Ret. Plan*, 947 F.2d 1412, 1417 (9th Cir. 1991) (internal quotation marks omitted). Accordingly, a court may overturn a decision only where it is "so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case or statute law." Oster *v. Barco of Cal. Employees' Ret. Plan,* 869 F.2d 1215, 1219 (9th Cir. 1988) (internal quotation marks omitted); *see Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623, 113 S. Ct. 2264, 2279-80 (1993).

Here, in determining that the plaintiffs were not employees, the Plan administrators applied a W-2 definition. According to the administrators, the Plans were designed with only W-2 employees of NWP in mind, namely NWP physicians. Therefore, it was clearly reasonable to apply a W-2 definition because that application limited disbursements of benefits to persons whom the Plans were intended to benefit. Furthermore, the Plan administrators relied upon an Internal Revenue Service private letter ruling that stated that W-2 employees of entitles within the Kaiser program other than NWP were not

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the discretion to interpret undefined terms even though statutory or common law defines them, we do not suggest that a court reviewing the reasonableness of an administrator's interpretation must be oblivious to common law definitions. Indeed, we recognize that some persons might be excluded from and some might be included within the definition of "employee" in both a W-2 and common law sense. Yet we do not foreclose the possibility that a court in an appropriate case could find that the administrator's definition was so gross a deviation from an accepted meaning of a term that the administrator by adopting the definition abused its discretion.

to be considered employees of NWP for tax purposes. Thus, it hardly could be argued seriously that adoption of a W-2 definition was unreasonable on the theory that there was no justifiable basis to exclude plaintiffs from the category of NWP W-2 employees.

We recently have held that a consistent pattern of interpretation is "significant evidence" that the plan administrator acted reasonably. *See McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1113 (9th Cir. 2000); *see also Hansen v. Western Greyhound Ret. Plan,* 859 F.2d 779, 781 (9th Cir. 1988). Additionally, both Plan administrators informed the plaintiffs in writing that the W-2 definition consistently had been followed with respect to eligibility under the Plans. Finally, the Plan administrators considered the *Darden* factors in determining whether the plaintiffs were employees pursuant to the terms of the Plans, and concluded that they were not.

In light of the evidence presented to the district court, and reviewing its decision *de novo,* we conclude the district court erred in denying NWP's motion for summary judgment. The Plan administrators' decisions were not "so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case or statute law." To the contrary, there was adequate support in the record from which the district court could, and should, have concluded that the Plan administrators did not abuse their discretion. We therefore reverse the district court's decision denying NWP's motion for summary judgment, and direct the district court to enter summary judgment in its *favor. See Lawyers Title Ins. Corp. v. Honolulu Fed. Sav. & Loan Ass's,* 900 F.2d 159, 164 (9th Cir. 1990) (noting where record supports only one resolution of factual issue, or mixed question of law and fact, reviewing court can order lower court to enter judgment on issue); *see also Martinez v. United States,* 669 F.2d 568, 570 (9th Cir. 1981) (same).

In view of our foregoing conclusions, we need not address NWP's alternative argument that it has set forth an adequate basis from which it would be reasonable to conclude that the plaintiffs are not employees of NWP under the common law definition. We note, however, that there was sufficient evidence of record to establish that the Plan administrators assessed the plaintiffs' relationship with NWP in light of the appropriate *Darden* factors and concluded that the plaintiffs were not common law employees. But, inasmuch as we predicate our decision on our conclusion that the Plan administrators did not abuse their discretion in applying a W-2 definition of employee, we do not address this issue further.

V. ATTORNEY'S FEES

We review a district court's award or denial of a request for attorney's fees for abuse of discretion. *See McElwaine v. US West, Inc.*, 176 F.3d 1167, 1171 (9th Cir. 1999); *Hope v. International Bhd. of Elec. Workers*, 785 F.2d 826, 831 (9th Cir. 1986). Here, however, plaintiffs as a matter of law are not entitled to recover attorney's fees as ERISA permits the award of attorney's fees only to a participant, beneficiary or fiduciary who succeeds on any significant issue in litigation which achieves some of the benefit brought in bringing suit. *See* 29 U.S.C. § 1132(g)(1); *Flanagan v. Inland Empire Elec. Workers Pension Plan & Trust*, 3 F.3d 1246, 1253 (9th Cir. 1993). In light of our conclusions, it is clear the plaintiffs have not prevailed on any issue in the litigation and that a court would abuse its discretion if it awarded them attorney's fees. Therefore, we reverse the district court's award of attorney's fees.

VI. CONCLUSION

We affirm the district court's application of an abuse of discretion standard in reviewing the Plan administrators' decisions, but we reverse its decision that the administrators

abused their discretion by not applying the federal common law definition of employee, and we reverse the award of attorney's fees. We remand the matter to the district court to enter judgment for the defendants.

AFFIRMED IN NO. 99-35962; REVERSED IN NOS. 9935936 and 00-35025.

COSTS TAXED IN FAVOR OF *DEFENDANTS-APPELLANTS- CROSS-APPELLEES.*

RAWLINSON, *Circuit Judge*, concurring:

I agree with the majority, for the reasons set forth in the majority opinion, that the district court had jurisdiction over this case. I also agree that the district court properly applied the arbitrary and capricious standard in reviewing the Plan Administrators' decisions. Finally, I agree that the award of attorney's fees by the district court should be reversed, and costs of appeal taxed in favor of defendants.

I write separately because I find it unnecessary to reach the pivotal issue addressed in the majority opinion: Whether the Plan Administrators had discretion to independently define "employee" for purposes of benefit eligibility. The majority opinion, relying on *Allen v. Western Conference of Teamsters Pension Trust Fund,* 788 F.2d *648* (9th Cir. 1986); *Administrative Committee of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson*, 164 F.3d 981 (6th Cir.1999), *cert. denied*, 528 U.S. 1114, 120 S.Ct. 931(2000); and *Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan,* 102 F.3d 1435, reached the conclusion that the Plan Administrators had discretion to define "employee" irrespective of the common-law definition.

I find it unnecessary to reach the issue of the Plan Administrators' discretion to independently define the term "employee", because the Plan Administrators applied common-law factors in determining plaintiffs' eligibility for plan benefits. The Plan Administrators articulated the following reasons for their decisions denying eligibility to plaintiffs:

1. Plaintiffs received their compensation, retirement, and welfare benefits from Kaiser Foundation Health Plan (Kaiser), rather than from defendants;

2. Kaiser withheld, reported, and paid federal and state payroll taxes;

3. Plaintiffs work at facilities owned by Kaiser;

4. Defendants did not provide equipment used by plaintiffs in their employment; and

5. Kaiser made ultimate employment decisions regarding plaintiffs' pay, benefits, hiring, and termination.

In Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323-24 (1992), the Supreme Court instructed us that "all of the incidents of the [employment] relationship must be assessed and weighed with no one factor being decisive" (citation omitted). With that stricture in mind, I am of the view that defendants adequately considered the "incidents of the relationship" among plaintiffs, Kaiser and defendant Northwest Permanente, and did not act arbitrarily in denying eligibility to plaintiffs. Accordingly, I would REVERSE the district court's decision on the basis that defendants excluded plaintiffs from coverage after considering the common-law employment factors set forth in Darden. I would not reach the issue of whether defendants may define "employee" without reference to the common-law factors.

APPENDIX B

THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF OREGON

CV-96-1166-ST

SANDRA HENSLEY; JOHN WIEST, JR.; LINDA and DONNA on ONHEIBER; HOHNSTEIN; behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NORTHWEST PERMANENTE P.C. RETIREMENT PLAN AND TRUST, a defined contribution pension plan; *et al*,

Defendants.

OPINION

STEWART, Magistrate Judge:

INTRODUCTION

This is a class action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 USC §§ 1001-1461. Plaintiffs are nurse practitioners and physician assistants. On behalf of themselves and the class of approximately 150 similarly situated individuals, plaintiffs allege that they are employed by Northwest Permanente, P.C. ("NWP") and have satisfied all eligibility requirements of, and therefore are entitled to participate in, two pension benefit plans sponsored by NWP: the Northwest Permanente P.C. Retirement Plan and Trust ("NWP Plan") and the Permanente Physicians Retirement Plan for Northwest

Permanente P.C. ("PPR Plan"). The administrators of both plans have decided that plaintiffs are not employees of NWP and therefore are not eligible to participate in either the NWP Plan or the PPR Plan. The Amended Complaint, filed on January 28, 1997, seeks a declaratory judgment and injunctive relief to include plaintiffs and class members as participants in the NWT-Plan am the PPR Plan with all accrued benefits.

On July 14, 1997, defendants filed a motion to determine the standard of review, arguing that this court should apply an arbitrary and capricious standard. Plaintiffs responded that due to a conflict of interest by the plan administrators, this court should exercise *de novo* review of the plan administrators' eligibility decision. On April 28, 1998, this court denied defendants' motion with leave to renew after the parties completed discovery on the limited issue of the standard of review. On August 28, 1998, defendants filed a renewed motion to determine the standard of review and on November 20, 1998, this court granted defendants' motion and determined that the abuse of discretion standard applied.

Now before the court are the parties' cross-motions for summary judgment (dockets #149 and #155). All parties have consented to allow a Magistrate Judge to enter final orders and judgment in this case in accordance with FRCP 73 and 28 USC § 636(c).

UNDISPUTED FACTS

NWP is a private corporation formed by an independent group of physicians to provide medical services to members of the Kaiser Permanente Medicare Program ("Kaiser Program").

The Kaiser Program provides comprehensive prepaid health care services to groups and individuals enrolled as members in Kaiser Foundation Health Plan, Inc. ("KFHP"), a nonprofit qualified health maintenance organization. KFHP

provides administrative and financial services within the Kaiser Program, maintains an affiliate (Kaiser Foundation Hospitals) to provide hospital facilities and services to members, and contracts with independent groups of physicians ("Medical Groups") to provide medical services. NWP is a Medical Group operating under an exclusive contract with KFHP. KFHP is the only common party to all major contact arrangements within the Kaiser Program.

KFHP pays wages, retirement, and health benefits to plaintiffs, who are salaried physician assistants and nurse practitioners, and other lesser paid health care service employees. Plaintiffs work with NWP physicians and other health care professionals within modules. NWP physicians are involved in some level of supervision over plaintiffs. NWP participates in the recruitment, training, and continuing education policy set by KFHP and joint administrative bodies and also participates in setting the schedule for medical personnel in the Kaiser Program.

NWP sponsors two retirement plans. The NWP Plan is a defined contribution plan administered by a 10 member committee ("NWP Plan Committee"), consisting primarily of NWP physicians. The PPR Plan is a defined benefit plan administered by a 10 member committee ("PPR Plan Committee") comprised of physicians and management level employees of KFHP and other various Medical Groups. Both plans are governed by plan documents which set forth criteria for eligibility to participate under each plan.

The named plaintiffs first submitted claims anonymously on December 22, 1994, seeking benefits under the NWP Plan and the PPR Plan. After some correspondence between counsel for plaintiffs and counsel for the NWP Plan and the PPR Plan, on April 26, 1996, plaintiffs were informed that in order for their claims to be considered, plaintiffs would have to reveal their identities. On June 28, 1995, plaintiffs

disclosed their identities and submitted a "formal claim and demand" for all benefits under plans sponsored by NWP.

On July 28, 1995, Ann Stenzel ("Stenzel"), the NWP Plan Administrator, denied plaintiffs' claims under the NWP Plan and on September 20, 1995, Ellen Canter ("Canter"), the PPR Plan Administrator, also denied plaintiffs' claims under the PPR Plan.

By letters dated September 21 and 22, 1995, plaintiffs requested a hearing and review of the initial decision under the NWP Plan. On November 3, 1995, Stenzel granted the request for a hearing and review and invited plaintiffs to "appear, with their attorneys, and submit evidence and arguments in support of their position," and to "submit in advance of the hearing evidence and written arguments they wish to be considered prior to the hearing." NWP Plan Administrative Record ("NWP Plan AR"), Affidavit of John v. Acosta ("Acosta Aff"), Exhibit 1 p. 63. In addition, Stenzel asked plaintiffs to advise her of any additional documents or information they wished to review before the hearing. Plaintiffs requested no additional documents or information and on November 27, 1995, withdrew their request for a hearing and requested "a final decision be made upon this matter based upon the record as it stands." Id at 64. On January 30, 1996, the NWP Committee armed Stenzel's denial of plaintiffs' claims.

On June 11, 1996, plaintiffs requested review of Canter's denial and submitted additional evidence. On December 18, 1996, the PPR Plan Committee affirmed Canter and denied plaintiffs' claims.

LEGAL STANDARD

As this court previously held, the Committees' decisions to deny benefits will be reviewed only for an abuse of discretion. Id. The term "arbitrary and capricious" also describes this

deferential standard of review. *See Dytrt v. Mountain State Tel. & Tel. Co.*, 921 F 2d 889, 894 (9th Cir 1990).

Under the arbitrary and capricious standard of review, an administrator's decision "is not arbitrary unless it is not grounded on any reasonable basis. "'*Horan v. Kaiser Steel Retirement Plan*, 947 F 2d 1412, 1417 (9th th Cir 1991) (emphasis in original), quoting *Oster v. Barco of Cal. Employees' Retirement Plan*, 869 F 2d 1215, 1219 (9th Cir 1988). Also, an arbitrary and capricious standard of review limits the court to consider only the evidence reviewed by the administrator at the time the eligibility decision was made. *McKenzie v. General Tel. Co. of Cal.*, 41 Fad 1310, 1316 (9th Cir 1994), *cert denied*, 514 US 1066 (1995); *Taft v. Equitable Life Assur. Soc.*, 9 F3 d 1469,1471(9th Cir 1993).

The authority to determine eligibility for benefits "inherently confers discretion" upon the plan administrator. *Snow v. Standard Ins. Co.*, 87 F 3d 327, 330 (9th Cir 1996). In this regard, an administrator's interpretation of "disputed" terms within a plan's eligibility provisions must "not be disturbed if reasonable." *Firestone Tire & Rubber*, 489 US at 111.

DISCUSSION

Plaintiffs argue that they are common law employees of NWP and thus are entitled to participate in both the NWP Plan and the PPR Plan. Plaintiffs argue that the Committees committed legal error by employing a definition for "employee" contrary to the federal common law definition. Thus, plaintiffs argue that this court should reverse the Committees' decisions, determine that plaintiffs are common law employees, and then remand for an award of benefits. Defendants vigorously disagree that the term "employee" must be construed in accordance with federal common law. Instead, they argue that they had the discretion to reasonably construe plan terms, including "employee."

I. Qualified Employee

According to the terms of both Plans, a "qualified employee" is eligible to participate in the Plans. The NWP Plan defines employee as "any employee of Employer," and defines "Employer" as NWP. Acosta Aff, Exhibit 4, pp. 10, 12. The PPR Plan defines a "qualified employee" as "any employee of the medical group," and defines "medical group" as NWP. *Id*, Exhibit 5, pp. 7-8, 48. Thus, under both Plans, a "qualified employee" is "any employee" of NWP.

Both Committees determined that plaintiffs were not eligible for participation in the Plans because they were not "qualified employees" of NWP. Each Committee determined that "employee" as used in the Plans means an employee who receives an IRS W-2 form from NWP and also listed several other secondary reasons why it did not consider plaintiffs to be "qualified employees." If the Committees committed legal error by employing an improper legal standard, then they abused their discretion. Thus, the issue is whether by construing the term "employee" as a W-2 employee, the Committees committed legal error.

Plaintiffs argue that the term "employee" in an ERISA plan must be construed in accordance with the common law definition if not otherwise defined in the plan, relying on *Nationwide Mutual Ins. Co. v. Darden*, 503 US 318 (1992). In Darden, the Supreme Court "adopt[ed] a common-law test for determining who qualifies as an `employee' under ERISA." *Id* at 323. Because the Plans provide that they are governed by federal law, plaintiffs contend that the Committees were obligated to interpret "employee" in accordance with *Darden*. However, *Darden* did not involve the interpretation of a term in an ERISA plan. Instead, the issue was whether Darden was a plan "participant" as defined by ERISA who could sue to enforce substantive provisions of ERISA. ERISA defined "participant" as "any employee or former employee of an employer. . . who is or may become

eligible to receive a benefit of any type from and employee benefit plan . . . "29 USC § 1132(a). The SupremeCourt held that in the absence of any further statutory guidance, the term "employee" should be construed in accordance with the common law test. Thus, the holding in *Darden* was limited to the correct statutory definition of "employee" as that term is used in ERISA. However, plaintiffs argue that the same rationale should be extended beyond terms found in the ERISA statute and applied to terms found in an ERISA plan.

Plaintiffs also rely on *Vizcaino v. Microsoft Corp.*, 120 F3 d 1006 (9th Cir 1997) which arose from Microsoft's practice of hiring workers to perform services as independent contractors. Although Microsoft fully integrated the workers into its workforce, it did not pay any payroll taxes for them or provide them with benefits. The Internal Revenue Service determined that based on common law principles, the workers were employees, not independent contractors, and

thus Microsoft should have paid payroll taxes. Because of this determination, Microsoft offered some of the workers positions as regular employees while others had the opportunity to work for a temporary employment agency who supplied Microsoft with temporary workers.

The workers then asserted that as employees, they should have had the opportunity to participate in two employee benefit plans which were available to all employees who met certain qualifications. The plan administrators determined that by signing contracts stating that they were independent contractors, the workers were not eligible to participate in the plans. After the workers filed suit challenging the plan administrators' denial of benefits, Microsoft conceded that they had been common law employees. Thus, when determining whether the plan administrators acted arbitrarily and capriciously, the Ninth Circuit assumed without deciding that the workers were common law employees. In the course of its analysis, the Ninth Circuit noted that "when Congress uses

the word 'employee,': courts 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning' of that word." *Vizcaino*, quoting *Darden*, 503 US at 322. However, the Ninth Circuit did not opine on the issue in this case, namely whether a plan administrator must give the "established meaning" to the term "employee" as used in an ERISA plan. Accordingly, plaintiffs reliance on *Vizcaino* is misplaced.

In opposition, defendants argue that the Ninth Circuit has afforded administrative bodies deference in defining and applying the term "employee," relying on two cases involving the Internal Revenue Service. *Spicer Accounting, Inc. v. United States*, 918 F 2d 90, 92 (9th Cir 1990) and *Professional & Exec. Leasing, Inc. v. Commissioner Internal Revenue Serv.*, 862 F 2d 751, 753 (9th Cir 1988). Both cases concluded that whether an individual is an "employee" is a mixed question of law and fact and therefore reviewing bodies, such as this court, should afford deference to decisions on this issue by lower bodies, such as the Committees. Thus, if defendants had applied the correct legal definition of "employee," then their factual determination as to employment status should be afforded deference. However, those cases do not resolve the issue as to whether the Committees should have applied the Darden test as the correct legal standard. Thus, neither case is particularly helpful.

Defendants also contend that mandating a particular interpretation of plan terms, such as "employee," would essentially negate a grant of discretion to a plan administrator to interpret plan terms. Instead, according to defendants, the plan administrators were free to apply any reasonable definition which is consistent with past practice, noting that "a court should defer to the administrator's reasonable resolutions of any ambiguities in the Plan's language,' rather than construe ambiguities in favor of plan participants."

Dockray v. Phelps Dodge Corp., 801 F 2d 1149, 1152 (9th Cir 1986), quoting *lung v. FMC Corp* 755 F 2d 708, 713 (9th Cir 1985). Defendants', argument disregards the underlying issue. That issue is not whether a plan administrator may apply any reasonable definition, but whether a term such as "employee," which has an established common law meaning, creates an ambiguity allowing for reasonable resolution by a plan administrator.

The Ninth Circuit has not addressed this precise issue, but according to the Seventh Circuit, a plan administrator's discretion is unfettered by common law meanings for terms. In *Trombetta v. Cragin Federal Bank for Savings Employees Stock Ownership Plan*, 102 F3 d 1435 (7th Cir 1996), the plan limited participation to "any individual who is or has been employed or self-employed by an Employer." *Id* at 143 8. Although not defined by the plan, the plan administrator construed the phrase narrowly and determined that plaintiffs were self-employed by themselves, not self-employed by the employer. Thus, they were not eligible to participate in the plan. The Seventh Circuit rejected the plaintiffs' argument that the plan administrator was required to apply *Darden* to determine the meaning of the phrase "employed or self-employed by an Employer." Instead, the court determined that the plan's grant of discretion to the plan administrator allowed the plan administrator to interpret terms differently than they are defined in ERISA or at common law.

This court is not persuaded to follow *Trombetta. A* reasonable interpretation by a plan administrator of an undefined term in the plan document must take into account whether the term has an accepted statutory or common law meaning. Under the Seventh Circuit's analysis, which allows the plan administrator to supply any definition it sees fit, the plan administrator would rarely, if ever, commit an abuse of discretion. This would make, a mockery of even the lenient arbitrary and capricious standard of review.

If a term were truly ambiguous, then the plan administrator would be well within its discretion to provide a reasonable meaning. However, in this case, the plan term is not ambiguous. The term "employee" has a well established common law meaning. Nor in this case does a plan explicitly define a term contrary to its common law or statutory definition. If it did, then the plan administrator reasonably could apply the definition in the plan. Instead, this is a case in which the plan administrators interpreted the plan documents by ignoring common legal principles.

To define an employee as one who receives a W-2 form simply based upon past practice is an unwarranted abdication to the employer of the plan administrator's responsibility. The W-2 form means only that NVVP has determined that it deems the recipient to be its employee. NWP's determination may be incorrect, just as Microsoft's initial determination was incorrect as to who was an independent contractor. The Committees, not NWP, must determine whether plaintiffs are "employees" of NWP by applying the correct legal standard. Because the plans did not expressly define the term "employee" as one who receives a W-2 form from NWP, the Committees should have applied the common law definition of "employee" in *Darden*. By failing to do so, the Committees abused their discretion.

II. Plaintiffs' Relationship to NWP

Plaintiffs request that this court apply the *Darden* factors, determine that they are employees of NWP, and then award benefits. Defendants respond that the Committees determined that plaintiffs were not common law employees after examining plaintiffs' relationship to NWP and. in reliance on the Internal Revenue Service's Letter Ruling.

The decisions by both Committees did reference some factors other than the receipt of W-2s, namely that (1) plaintiffs worked at facilities owned by KFHP; (2) KFHP

hired plaintiffs; (3) circumstances surrounding plaintiffs' employment indicate that they were considered KFHP employees; (4) NWP physicians do no have the firing authority over plaintiffs; and (5) plaintiffs' on-the-job grievance procedure is through KFHP. However, the analyses of these factors are hardly thorough and contain no supporting references to the record. Further, the Committees did not examine, and apparently had no evidence concerning, many of the factors the Supreme Court found relevant to the inquiry. Under *Darden,* the Committees should have

> consider[ed] the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projections to the hired party; the extent of the hired parties discretion over when and how long to work; the method of payment; the hired parties role in hiring and paying assistance; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 US at 323-24.

Plaintiffs urge this court to apply the *Darden* factors and conclude that they are employees as a matter of law, but Vizcaino dictates otherwise. In *Vizcaino,* the court recognized that a plan administrator should be allowed to make determinations "which belong[] to the plan administrator in the first instance." Vizcaino, 120 F3d at 1013. Although in this case the Committees determined that plaintiffs were not employees, they employed the wrong legal standard. This court should not preempt the Committees' fact-finding authority by applying the *Darden factors* itself. Instead, the

decisions should be remanded to the Committees to allow them to make the initial determination using the correct legal standard and obtaining additional evidence as needed.

DATED this 12th day of August, 1999.

/s/ Janice M. Stewart
JANICE M. STEWART
United States Magistrate Judge

APPENDIX C

29 USCS § 1132

TITLE 29. LABOR

CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM PROTECTION OF EMPLOYEE BENEFIT RIGHTS REGULATORY PROVISIONS ADMINISTRATION AND ENFORCEMENT

29 USCS § 1132 (2001)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) or under subsection (i) or (I);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [29 USCS § 1169 (a)(2)(A)]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [29 USCS § 1021(f)(1)], (A) to enjoin any act or practice which violates subsection (f) of section 101 [29 USCS § 1021(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [subtitle] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1986 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USCS §§ 1051 *et seq.*, §§ 1081 *et seq.*] (relating to participation, vesting, and funding), only if-

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan. (2) The Secretary shall not initiate an action to enforce section 515 [SCS § 1145]. (3) The Secretary is not authorized to enforce under this part any requirement of part 7 [29 USCS §§ 1181 *et seq.*] against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 733(a)(1) [29 USCS § 1191b (a)(1)]). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form.

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 or section 101(e)(1) [29 USCS § 1166(a)(1) or (4) or § 1021(e)(1)] with

respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4) [29 USCS § 1021(b) (4)]. For purposes of this paragraph, an annual report that has been rejected under section 104(a)(4) [29 USCS § 1024 (a)(4)] for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [29 UCS. § 1021(d)] with respect to any participant or beneficiary or who fails to meet the requirements of section 101(e)(2) [29 USCS § 1021(e)(2)] with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 101(f)(1) [29 USCS § 10.21(f)(1)].

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 101(g) [29 U.SCS § 1021(g)].

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 104(a)(6) [29 USCS § 1024(a)(4)], the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1144(c)(8) of the Social Security Act [42 USCS § 1320b-14(c) (8)

(d) Status of employee benefit plan as entity.

(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall

notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101 (f)(1) [29 USCS § 1021(f)(1)]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or

fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USCS § 1145 in which a judgment in favor of the plan is awarded, the court shall award the plan-

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of-

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1986 [26 USCS § 6621].

(h) Service upon Secretary of Labor and Secretary of the Treasury. A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any

action under part 4 of this subtitle [29 USCS §§ 1101 *et seq.*]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty. In the case of a transaction prohibited by section 406 [29 USCS § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [26 USCS § 4975(f) (4)]) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [26 USCS § 4975 (f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 USCS § 4975(e)(1)].

(j) Direction and control of litigation by Attorney General. In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor. Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the

plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries.

(1) In the case of-

(A) any breach of fiduciary responsibility under (or other violation of) part 4 [29 USCS §§ 1101 *et seq.*] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)-

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that-

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986 [26 USCS § 4975.].

(m) Penalty for improper distribution. In the case of a distribution to a pension plan participant or beneficiary in violation of section 206(e) [29 USCS § 1056(e)] by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

APPENDIX D

PERMANENTE PHYSICIANS RETIREMENT PLAN

FOR

NORTHWEST PERMANENTE, P.C/PHYSICIANS & SURGEONS

(As Amended and Restated Effective January 1, 1993)

ARTICLE A. PURPOSE

The Medical Group adopted this Plan to provide income and financial security for Physicians and other Medical Group Employees during their Retirement The Medical Group adopts the 1994 Restatement of the Plan to update Plan language, ensure compliance with applicable law, and make other clarifying and administrative changes. Each employee of the Medical Group who qualifies under the Plan's terms shall receive a monthly Retirement Income for life based on Credited Service and Highest Average Compensation.

An Affiliate may adopt this Plan by a written statement signed by the Affiliate. approved by the Medical Director of the Medical Group, and filed with the Trustee. The statement shall include the effective date of the adoption and any special provisions that are to be applicable only to employees of the affiliate.

Each pear the Medical Group contributes amounts which an independent actuary determines are sufficient to fund this Plan for its Employees. The contributions are made to a Trust which is maintained by the Trustee expressly for this Plan.

The Restatement shall be effective January 1, 1993 or such earlier dates as are required by law.

Capitalized words are defined in Article M.

ARTICLE B. ELIGIBILITY

Section B-1. *Participation by Qualified Employees*

An employee becomes a Plan Participant pant on the day employed by Medical Group as a qualified employee.

Section B-2. *Definition of Qualified Employee*

A qualified employee means any employee of the Medical Group except:

(a) *Collective Bargaining Employee*

An employee covered by a collective bargaining agreement that does not Provide for participation in this Plan.

(b) *Leased Employee*

A leased employee treated as an employee for pension purposes solely because of section 414(n) of the internal Revenue Code.

(c) *Special Contract Employee*

An employee whose terms of employment do not provide for Participation in this Plan.

Section B-3. *Continuation of Participation*

Once an employee's participation begins, it continues during Service and thereafter during Retirement. Participation in the Plan ends if the Participant becomes a non-qualified employee or terminates Service before eligibility for Retirement under Article D.

ARTICLE J. ADMINISTRATION AND MANAGEMENT OF THE PLAN AND PLAN ASSETS

Section J-6. *Duties and Powers of Administrative Committee*

(a) *Administration of Plan*

The Administrative Committee has full power, authority and discretion to administer the Plan, and to do all things necessary or convenient in connection therewith.

(b) *Interpretation*

The Administrative Committee establishes procedures, rules, regulations, interpretations, computations and actions for determining questions arising in the administration, interpretation, and application of the Plan and shall have sole discretion to interpret the terms of the Plan and to determine eligibility for benefits under the Plan. The Administrative Committee's procedures, rules, regulations, interpretations, computations and actions shall be conclusive and binding on all persons. The Plan is administered in a nondiscriminatory manner with respect to all persons in a like situation.

The Plan is construed in accord with the following rules:

(i) Interpretation. The Plan is interpreted in accordance with ERISA.

APPENDIX E

NORTHWEST PERMANENTE. P.C.
RETIREMENT PLAN AND TRUST

1994 RESTATEMENT

January 1, 1989

Northwest Permanente, P.C.
an Oregon corporation
Kaiser Permanente Bldg.
500 NE Multnomah Street
Suite 100
Portland, Oregon 97210-5398 Company

The Bank of California,
a national banking association
407 SW Broadway
Portland, Oregon 97205 Trustee

The Company has adopted and maintains this plan and trust effective January 1, 1978 and as restated and amended through Amendment No. 4 to the 1985 Restatement.

The Company adopts this Restatement to add a 401(k) profit sharing component to the Plan, to update plan language, to ensure continued compliance with applicable law, and to make other clarifying and administrative changes.

ARTICLE III

Eligibility and Service

3.01-3 "Qualified Employee" means any employee of Employer except the following:

(a) An employee covered by a collective bargaining agreement that does not provide for participation in this plan.

(b) A leased employee treated as an employee for pension purposes solely because of section 414(n) of the Internal Revenue Code.

(c) An irregular-Service or on-call physician and any physician who is covered by an employment agreement that does not provide for participation in this plan.

3.01-4 Every employee entitled to participate in or having an account under this plan shall be known as a participant. The Committee shall furnish each participant with information about the plan and benefits under it.

ARTICLE IX

Plan Administration

9.02-2 The Committee shall be the plan administrator under federal laws and regulations applicable to plan administration and shall comply with such laws and regulations. The Chair of the Committee shall be an agent for service of process on the plan at the Company's address.

ARTICLE XIII

Miscellaneous Provisions

13.02 Applicable Law

This plan and trust shall be construed according to the laws of Oregon except as preempted by federal law.

APPENDIX F

AFFIDAVIT OF SANDRA HENSLEY

STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

I, Sandra Hensley, being first duly sworn, depose and say as follows:

1. I am a licensed nurse practitioner in the State of Oregon and have been such since 1977.

2. I was interviewed by Northwest Permanente, P.C. ("NWP") in 1976, and I was hired to work as a nurse practitioner in the Health Appraisal Program. I have worked in the Kaiser Permanente system ever since and always with the NWP doctors in the medical clinics. My work history in that regard is as follows: 1976-1981 Health Appraisal Program; 1981 to present in internal medicine department of the Beaverton medical office.

3. The remaining facts in this affidavit relate to my knowledge of the Kaiser system and the medical clinics in which I have worked.

4. The staffing of the medical clinics includes primary care physicians, subspecialists, physician assistants and nurse practitioners. We all work together as a team to provide services to members of the Kaiser Foundation Health Plan ("Health Plan"). NWP supervises all of our activities and schedules our work. The participation of all of the staff of the clinic is necessary to properly provide the services for which the clinic is designed.

5. Physician assistants (PA) and nurse practitioners NP are referred to by NWP as allied health professsionals. These allied health professionals are recruited for the clinics by NWP, they are hired only on the recommendation of NWP, and they are terminated only

at the request of NWP. The performance of the allied health professionals is reviewed annually by NWP, and any adjustment in their compensation or the scale of compensation for these professionals is made only upon the recommendation and concurrence of NWP.

6. All of the schedules of the allied health professionals for vacation time, sick leave and leaves of absence are made and controlled by NWP. Likewise, continuing education and on-the-job training is controlled by NWP. NWP recommends and pays for continuing education.

7. Prior to 1979 NWP supervised and authorized the prescription writing by nurse practitioners. Thereafter, by statute nurse practitioners have been able to do this independently. NWP pays the licensing fees for any of those professionals who apply for prescription writing privileges.

8. NWP sets the job descriptions for all of the allied health professionals; it provides the malpractice insurance protection for us.

9. All of my working time since 1976 has been for the medical offices. I have no legal ownership in the clinics, and I receive no profit nor do I sustain any loss from their operations.

10. All records that I am required to keep on the job are records of the medical offices. From time to time I make reports on the job to NWP.

11. Over the years I have retained certain of the materials that have been supplied to me by NWP on the job. Some of these materials are indicative of the control NWP has over me on my job and indicate that I am in reality an employee of NWP, even though my paycheck comes from and some of my employment records may

be with Health Plan. Those records are attached hereto as the following exhibits:

Exhibit 1: Electronic Memorandum, dated 3/4/96, from NWP to All NWP Physicians and Allied Health Professionals.

Exhibit 2: Electronic Memorandum, dated 12/10/95, from Karlin, MD.

Exhibit 3: Inter-Office Memorandum, dated 12/5/95, from Marci Clark, NWP, to Allied Health Professionals.

Exhibit 4: Allied Health Council Meeting, 10/19/95.

Exhibit 5: Interoffice Memorandum, dated 9/5/95, from NWP Admin Team to All Clinicians.

Exhibit 6: Allied Health Performance Appraisal, NWP, Annual for Sandra Hensley, 8/21/95.

Exhibit 7: Same as above for 8/18/94.

Exhibit 8: Electronic Memorandum, dated 5/8/95.

Exhibit 9: Inter-Office Memorandum, dated 2/20/95.

Exhibit 10: Inter-Office Memorandum, dated Feb 94, subject Allied Health After Hours Work in the Bess Kaiser Area.

Exhibit 11: Inter-Office Memorandum, dated 9/30/94, Allied Health After Hours Work.

Exhibit 12: Interoffice Memorandum, dated 1/19/94, to All Allied Health Professionals re 1994 Continuing Education Fund application.

Exhibit 13: Voucher of NWP for Allied Health Education Fund 1990.

Exhibit 14: Inter-Office Memorandum, dated 1/4/94, Marci Clark, NWP, to Allied Health Professionals re 1995 Salary Adjustments.

Exhibit 15: From The President's Desk, dated 11/25/94.

Exhibit 16: From The President's Desk, dated 10/20/94.

Exhibit 17: Inter-Office Memorandum, dated 12/20/85, from Acting Medical Director, NWP, to Allied Health Personnel and All Chiefs.

Exhibit 18: Inter-Office Memorandum, dated 6/21/85, from Marci Clark to Allied Health Professionals re 1985 Education Allowance.

Exhibit 19: Classified Ad, Oregonian, dated 10/22/95, for Nurse Practitioner -Geriatrics.

Exhibit 20: Nurse Practitioners of Oregon Registry Employment Opportunities, May 1995.

Exhibit 21: Electronic Memorandum, dated 3-22-96, NWP establishes "leave without pay" policy for clinicians.

Exhibit 22: Electronic Memorandum, dated 3-6-96, explaining that Allied Health Professionals are controlled by NWP Tb test rule, not Health Plan's Rule.

/s/ Sandra Hensley
SANDRA HENSLEY

SUBSCRIBED AND SWORN to before me this 5th day of June, 1996.

[SEAL] OFFICIAL SEAL
CRISTY E. WALKER
NOTARY PUBLIC – OREGON
COMMISSION NO. 019924
MY COMMISSION EXPIRES DEC. 29, 1996

/s/ Cristy E. Walker
CRISTY E. WALKER
Notary Public

(2)

No. 01-672

Supreme Court, U.S.
FILED
NOV 30 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SANDRA HENSLEY; *et al.*,
Petitioners,

v.

NORTHWEST PERMANENTE P.C. RETIREMENT PLAN AND TRUST, a defined contribution pension plan; *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners' first question aids them only where their desired answer—that the administrators had to draw the legal conclusion that the common law definition of "employee," and no other, could apply—becomes their premise as well. Its logical fallacy makes this Court's consideration of the question unproductive.

Moreover, petitioners' argument was neither presented to nor examined by the Ninth Circuit Court of Appeals. We see from petitioners' brief in that court that their wish for *de novo* review of the administrators' plan interpretation was predicated only upon a claim that the administrators were tainted by a conflict of interest. (*See* Brief of Appellees/Cross-Respondents (petitioners) at pp. 18-26 ("Due to Conflicts of Interest, the Court Should Have Reviewed the Decision Under a Less Deferential Standard of Review").) At no point there did petitioners urge the question they present and argue now. Instead, they substantially conceded the issue:

> The Court in *Firestone*[*] * * * concluded that the *de novo* standard of review was appropriate, except where the Plan expressly provided for administrative discretion in determining eligibility for benefits, in which case the abuse of discretion, or arbitrary and capricious, standard would apply.

(Brief of Appellees/Cross-Respondents at pp. 20-21.)

Petitioners make no contention in this Court of administrator conflict of interest, but that was their sole contention below. The Ninth Circuit was not asked to consider, and did not need to consider, the context of the question that petitioners now present to this Court. (*See* Petition 14a-22a,

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[*] *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

Ninth Circuit Opinion.)** Prudence and fairness dictate thatthe Court should deny certiorari on that basis alone. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993).

Petitioners' second question is whether administrators, vested by the plans with full discretion to interpret the plans, are constrained without discretion to apply to the plans the common law definition of "employee" that this Court has applied to the ERISA statute. Petitioners raised that question to the Ninth Circuit, which looked to the unanimous views of the Sixth, Seventh, and Ninth Circuits in rejecting petitioners' argument. 23a-26a.) As discussed later in this Brief, petitioners' attempt to demonstrate an intercircuit conflict on that question does not succeed.

Petitioners offer this Court nothing on which to base a fruitful review of the decision below.

** Appendix page citations in this Brief are to the Appendix to the Petition for Certiorari. The Appendices to this Brief, which are the denial letters of the administrators, are not cited herein by page number.

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Ninth Circuit, with their correctly stated status before that court:

Sandra Hensley, plaintiff/appellee-cross-appellant.

John Wiest, plaintiff/appellee-cross-appellant.

Linda Onheiber, plaintiff/appellee-cross-appellant.

Donna Hohnstein, plaintiff/appellee-cross-appellant.

Northwest Permanente P.C., an Oregon corporation, defendant/appellant-cross-appellee.

Northwest Permanente P.C. Retirement Plan and trust, a defined contribution pension plan, defendant/appellant-cross-appellee.

Retirement Plans Committee of the Northwest Permanente P.C. Retirement Plan and Trust, an unincorporated association, defendant/appellant-cross-appellee.

Permanente Physicians Retirement Plan for Northwest Permanente P.C., a defined benefit plan, defendant/appellant-cross-appellee.

The Administrative Committee of Permanente Physicians Retirement Plan for Northwest Permanente P.C., an unincorporated association, defendant/appellant-cross-appellee.

CORPORATE DISCLOSURE STATEMENT

Respondent Northwest Permanente P.C. is a privately held corporation with no parent, affiliate or subsidiary corporations.

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IN THE

Supreme Court of the United States

No. 01-672

SANDRA HENSLEY; *et al.*,
Petitioners,

v.

NORTHWEST PERMANENTE P.C. RETIREMENT PLAN AND TRUST, a defined contribution pension plan; *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' Statement of the Case Is Inaccurate

The statement of the case submitted by Petitioners/Plaintiffs-Respondents-Cross-Appellants below (hereinafter, "petitioners") is inaccurate. Respondents/Defendants-Appellants-Cross-Respondents below (hereinafter, "respondents") submit that the Ninth Circuit's opinion should be consulted as a more accurate and balanced discussion of the factual background of this case. (*See* 4a-9a); 258 F.3d at 989-91.[1]

[1] Due to a typographical error in the briefs, the district court, the Ninth Circuit and the Petition all refer to the Kaiser Foundation Medical Care Program (the "Kaiser Program") as a "Medicare" program, which is not

Factual inaccuracies in the Petition include the following:

1. The Petition fails to inform the Court that the administrator of each plan not only evaluated petitioners' benefits claims under the historically applied "W-2" definition, but also made findings of fact and determined that petitioners were ineligible to participate even using the common law definition of "employee." (*See* 28a-29a, majority opinion, 29a-32a, Rawlinson, J. concurring; 258 F.3d at 1002-03; 38a, 42a-44a, district court opinion.)[2] In this regard, petitioners have omitted any mention of the following important factual findings of the administrators relevant to their evaluation of petitioners' claims under the common law definition of "employee," which neither the district court nor the Ninth Circuit has found to be erroneous:

- Petitioners have always received their compensation and pension and health benefits from Kaiser Foundation Health Plan ("Health Plan");
- Health Plan has always withheld, reported, and paid the federal and state payroll taxes of petitioners;

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the case. (*See, e.g.*, 5a.); 258 F.3d at 989. Members who enroll in the Kaiser Program are not restricted merely to those receiving "medicare" benefits.

[2] The district court acknowledged that the administrators had evaluated petitioners' claims under the common law definition of "employee," but reversed for reevaluation by the administrators on grounds that their analysis of the common law factors set forth in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), was not, in the district court's opinion, "thorough." (38a, 42a-44a.) The district court's assertion that the factual findings of the administrators were not accompanied by citations to the record is wrong. (43a.) As shown in the denial letters of the administrators (Appendices A through D to this Brief), specific reference was made to a number of sources consulted, in addition to the common knowledge of each administrative committee, concerning the facts relevant to petitioners' claims. The Ninth Circuit found the various factual findings of the administrators "sufficient" under the common law definition. (*See* 28a-29a, majority opinion, 29a-32a, Rawlinson, J. concurring); 258 F.3d at 1002-03.

- Petitioners signed various documents which evidence their clear understanding that they have always been employees of Health Plan, not Northwest Permanente, P.C. ("NWP");
- Petitioners applied for employment with Health Plan;
- Petitioners were hired by Health Plan;
- Petitioners worked at facilities owned by Health Plan;
- NWP does not provide the equipment used by petitioners in their employment;
- NWP physicians do not have authority to determine petitioners' compensation or to terminate petitioners;
- Petitioners' on-the-job grievance procedures are through Health Plan alone; and
- The plan administrators considered a Private Letter Ruling from the Internal Revenue Service ("IRS") to the plans' sponsor, NWP, which stated that W-2 employees of entities within the Kaiser Program other than NWP were not to be considered employees of NWP for tax purposes.

(*See* Appendices A through D; 5a-6a, 27a-29a, 31a-32a; 258 F.3d at 990, 1002-03; 35a.)

These factual findings distinguish this case markedly from cases where it has been unclear whether an individual was an employee or an independent contractor. By their actions, petitioners have acknowledged, agreed and clearly understood at all times that they have always been employed by Health Plan.

2. Petitioners omit a central motivation for the administrators' historical and consistent use of the "W-2" definition. As explained in the Ninth Circuit's opinion, the "W-2" definition was consistently applied as a reasonable interpretation of the term "employee" because "the Plans were designed with only W-2 employees of NWP in mind,

namely NWP physicians," and the IRS had previously issued the Private Letter Ruling holding that petitioners were not employees of NWP for tax purposes. (27a.)

3. NWP is a separate legal entity made up of doctors who provide medical services within the Kaiser Program pursuant to a contractual arrangement between NWP and Health Plan. (5a.) NWP is not an affiliate of Health Plan or Kaiser Foundation Hospitals. (*Id.*)

4. Petitioners fail to inform the Court that the record before the two plan administrators was different. (*See* 6a-7a.) After being informed of their right to a hearing and to submit evidence—such as the Affidavit of Sandra Hensley set forth in the Petition's Appendix (60a-63a)—petitioners informed the administrator of the Northwest Permanente P.C. Retirement Plan and Trust (the "NWP Plan") that they would submit no further evidence and requested a "final decision . . . based on the record as it stands." (7a.) Thus, when the NWP Plan administrator ruled on petitioners' claims, neither the Hensley Affidavit (60a-63a) nor any of the materials attached thereto were in the record. (7a.) Those materials were later submitted, however, to the administrator of the Permanente Physicians Retirement Plan for Northwest Permanente P.C. (the "PPRP"). (*Id.*)

5. The Petition does not accurately describe the decision-making sequence of the plan administrators with respect to petitioners' claims. The Retirement Plans Committee, which administers the NWP Plan, for many years has legally delegated the authority to make initial benefits eligibility determinations on its behalf to Ann Stenzel, the Director of Pensions and Benefits for NWP. (18a-19a & fn.6); 258 F.3d at 997 & fn.6. Similarly, the PPRP administrator has legally delegated the authority to make initial eligibility determinations on behalf of the committee to Ellen Canter, the Director of Employee Benefits Services at Health Plan. (20a-21a); 258 F.3d at 997-98. Thus, petitioners are inaccurate

when they state that "[t]he NWP Plan Committee affirmed the decision of the NWP Plan Administrator and the Physicians Plan Committee affirmed the decision of the Physician Plan Administrator." (Petition at p. 4.) The committees *are* the plan administrators. The committees reviewed and affirmed earlier decisions that they had each issued by and through their legally designated representatives, Stenzel and Canter.

6. Petitioners' assertion that "[n]either plan specifically defines the term 'Qualified Employee'" is incorrect. (Petition at p. 3.) Indeed, as petitioners explain in the paragraph preceding this statement, the plans define "Qualified Employee" in detail; only the term "employee" within the definition of "Qualified Employee" is left undefined.

ARGUMENT

A. The Ninth Circuit Correctly Held that the Administrators' Historical and Consistent Application of a Reasonable "W-2" Definition of "Employee" Was Entitled to Substantial Deference on Review

The Ninth Circuit correctly ruled (1) that the administrators of the plans had plenary discretion under the terms of the plans to interpret plan terms and make eligibility determinations, (2) that the administrators had historically and consistently used a reasonable "W-2" definition of "employee" in making all eligibility determinations, and (3) that the administrators' rulings on petitioners' claims were therefore entitled to substantial deference from the district court on review. Petitioners are correct that a district court reviews *de novo* an administrator's resolution of a legal issue. Petitioners are incorrect, however, in arguing that the administrators resolved an issue of law in determining that petitioners were not eligible to participate under the terms of the respective plans. Given the historical, consistent,

reasonable and fair application of the "W-2" definition in making all eligibility determinations, the particular facts of this case did not require the administrators as a matter of law to use a federal common law definition of "employee." Thus, the decision of the administrators involved a question of plan interpretation, not a determination of common law employee status.

1. Petitioners' Cases Are Inapposite or Distinguishable

No one disputes that an administrator's resolution of a legal issue is reviewed *de novo*, and the Ninth Circuit has incorporated that well-established principle as a corollary to the arbitrary and capricious standard of review. (*See* 27a, stating that a "court may overturn a decision" of an administrator "'where it . . lack[s] . . . authority in governing case or statute law.'" (quoting *Oster v. Barco of Cal. Employees' Ret. Plan*, 869 F.2d 1215, 1218 (9th Cir. 1988)).) *Accord Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1013 (9th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998). The precise issue in this case, however, is whether the administrators were required as a matter of law to apply the common law definition of the term "employee," even though they had plenary discretion under the plans to interpret terms and make eligibility determinations, and had always applied a consistent, reasonable "W-2" definition of the term "employee" in determining who was eligible to participate. The numerous cases petitioners cite for the abstract proposition that review *de novo* review applies where an administrator resolves a legal question are inapposite because they do not address the issue at bar. (*See* Petition at pp. 9-10, citing *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352-53 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); *Pratt v. Petroleum Prod. Mgmt. Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 657 (10th Cir. 1990); *Brown v. Ret. Comm. of Briggs & Stratton Ret. Plan*, 797 F.2d 521, 525-26 (7th Cir. 1986), *cert. denied*,

479 U.S. 1094 (1987); *Vizcaino*, 120 F.3d at 1013; *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992).)

Petitioners misconstrue or misrepresent the holdings of cases they cite for the proposition that only a federal common law definition of "employee" applies when a plan does not specifically define the term otherwise. As the bullet point discussion below demonstrates, the cases petitioners rely upon are inapposite or distinguishable because they involved either (1) the clear application of ERISA's *statutory* definition of "employee"; (2) an administrator's interpretation of non-plan documents; (3) administrators who, unlike here, had been granted no discretionary authority to interpret plan terms; or (4) plans that expressly incorporated the common law definition of "employee." Contrary to petitioners' suggestion, there is no inter-circuit split as to whether the determination of "employee" status under a federal common law or ERISA statutory definition of the term is ultimately a question of law. All circuits agree that it is.[3] This abstract proposition of law is simply beside the point, however, because it does not address the particular issue in this case. None of the cases cited by petitioners has involved a historically and consistently applied reasonable non-common law definition of the term. This case is unique on its facts, and the closest cases—cited in the Ninth Circuit's opinion, *see* discussion *infra*—indicate that the administrators here acted well within the limits of their plenary discretion to interpret plan terms and make eligibility determinations.

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[3] The Tenth Circuit has stated that "'the determination of whether an individual is an employee is a question of fact.'" *Roth v. Am. Hosp. Supply Corp.*, 965 F.2d 862, 865 (10th Cir. 1992) (quoting *Marvel v. United States*, 719 F.2d 1507, 1515 (10th Cir. 1983)). However, that statement preceded this Court's decision in *Darden*, 503 U.S. 318, where the Court held that "employee," *as used in ERISA*, incorporates traditional agency law criteria for identifying the difference between an employee and an independent contractor.

• In *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1100 & fn.3 (5th Cir. 1990), *de novo* review was applied to the administrator's interpretation of ERISA, not the plan:

> [I]n contrast to the great deference we grant the Committee's interpretations of the Plan, which involve contract interpretation, we accord no deference to the Committee's conclusions as to the controlling law, which *involve statutory interpretation.* The interpretation of ERISA itself must be made *de novo* by the court.[3]

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[3] We are accustomed to giving some deference to governmental agency interpretations of their organic statutes. This case is widely different because it involves whether deference should be given to private parties–a pension committee–in *interpretation of a statute.* We do not give the right to interpret statutes to private citizens. We of course grant deference to the Committee's factual determinations that are necessary to the review of law questions.

(Emphasis added.)

• In *Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606, 611 (5th Cir. 1999), the Fifth Circuit held that *de novo* review applied to the administrators' interpretation of a contract that was not part of the plan:

> In this case, however, the Plan administrators neither made factual determinations nor interpreted the Disability Plan. Instead, the Plan administrators interpreted the meaning of a separate contract between Dial and Marye . . . A court reviews a plan administrator's statutory and legal conclusions *de novo.* Likewise, the district court here did not owe deference to the Disability Plan administrators' *interpretation of a domestic relations order, a contract judicially approved by a state court.*

(Emphasis added; citation omitted.)

• *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987) is off point for two reasons. First, the court addressed the statutory definition of employee because the plaintiff "challenged the Administrators' position that she was hired as a contractor and not as an 'employee,' *as that term is defined by ERISA*." *Id.* at 1535 (emphasis added). As the D.C. Circuit explained, "whether an individual is an employee or an independent contractor" involves "an *interpretation of a statute–ERISA*" and is therefore "a question of law." *Id.* at 1536 (emphasis added). Second, the applicability of the common law definition of "employee" was not at issue because "all parties agree[d] that common-law principles of agency govern[ed] . . ." *Id.* at 1535. Thus, the issue before this Court never arose.

• *Weil v. Retirement Plan Administrative Committee of The Terson Co.*, 913 F.2d 1045 (1990), *vacated in part on reh'g*, 933 F.2d 106 (2d Cir. 1991) also involved an administrator's interpretation of a federal statute. The court explained:

> Here, it is undisputed that the Plan gave the Committee discretionary authority to determine eligibility for benefits and to interpret the Plan. . . .
>
> Nonetheless, the Committee's decision to deny benefits to plaintiffs was unique in that it *turned on a question of law. Article III(26) of the Plan explicitly defines partial termination "within the meaning of Section 411 of the Internal Revenue Code."* When an eligibility determination by plan administrators turns on a question of law, courts have not hesitated to apply a *de novo* standard of review.

Id. at 1048-49 (emphasis added).

• Petitioners' citation to *O'Neil v. Retirement Plan for Salaried Employees of RKO General, Inc.*, 37 F.3d 55 (2d Cir. 1994) is curious, since that case actually supports respondents' position. In that case, the plaintiffs argued that the

administrator was required to apply an established statutory definition when interpreting the terms of the plan. *Id.* at 62. The Second Circuit held otherwise and applied the arbitrary and capricious standard of review, according substantial deference to the administrator's interpretation of the plan. *Id.* *O'Neil* demonstrates, point blank, that petitioners' argument is wrong.

• *Berger Transfer & Storage v. Central States, Southeast & Southwest Areas Pension Fund*, 85 F.3d 1374 (8th Cir. 1996) did not involve review of the construction of plan terms by an administrator given plenary discretion. Rather, that case involved review of a district court's determination that truckers "were employees under ERISA" rather than independent contractors. *Id.* at 1380. Furthermore, federal regulations required language in the employment agreements at issue in *Berger* which made it necessary to apply common law factors in determining the employment status of the truckers. *Id.* at 1378-79. The *Berger* decision bears no resemblance to this case.

• *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984) is off base for two reasons. First, the plan incorporated ERISA statutory provisions. *Id.* at 569. Second, the plan expressly provided that "Illinois law shall govern issues of construction." *Id.* The administrator was thus required to apply Illinois "common law" to determine whether the plaintiffs were "employees." *Id*

• In *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 822 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), the plan expressly stated that in construing the phrase "employee status" only the "'common law test, or the applicable statutory definition of master-servant relationship shall control.'" Furthermore, the plan provided that Illinois law controlled "questions of construction." *Id.* at 825.

• *Coonley v. Fortis Benefit Insurance Co.*, 956 F. Supp. 841, 849 (N.D. Iowa), *aff'd*, 128 F.3d 675 (8th Cir. 1997) is inapposite because that case involved the interpretation of an insurance policy (where *contra proferentem* is often applicable), and more importantly, because the court found that "no party assert[ed] that the Plan in question . . . vest[ed] discretionary interpretive authority" in the administrator. Indeed, *Coonley* can be interpreted favorably to respondents because the court observed that if the administrator had been granted the authority to construe plan terms, the "abuse of discretion" standard would have applied. *Id.*

• Nor did *Vizcaino*, 120 F.3d 1006, address the issue at bar. First, both parties "conceded" that the plaintiffs "were common law employees." *Id.* at 1010. Indeed, the parties "asserted that the Workers' status [was] a 'nonissue' because they concede[d] that the Workers were common law employees." *Id.* Furthermore, the plan expressly defined "employee" to mean "'any *common law employee* . . . who is on the United States payroll of the employer.'" *Id.* (emphasis added; ellipsis in original).

• *Mayeske v. International Ass'n of Fire Fighters*, 905 F.2d 1548 (D.C. Cir.), *cert. denied*, 498 U.S. 940 (1990) is distinguishable on several grounds. First, the court was reviewing the decision of a district court, and not of a plan administrator. Second, there is no indication that the district court was vested with the kind of plenary discretion to interpret plan terms that exists in this case. Third, because the district court was not a plan administrator, there was no argument to be made, as respondents argue here, in favor of a reasonable W-2 definition of "employee" that had been applied consistently for many years.

• Finally, petitioners' reliance on *Darden*, 503 U.S. 318, is misplaced because the Court in that case merely held that where Congress has not indicated otherwise, "employee," as used in the ERISA *statute*, incorporates traditional agency

law criteria for identifying the difference between an employee and an independent contractor. As the district court and the Ninth Circuit both observed, *Darden* does not speak to the issue in this case, *i.e.*, whether a federal common law definition of the term "employee" must be used notwithstanding consistent application by the administrator of another reasonable construction of that term as it appears within the confines of an ERISA *plan*. (*See* 25a-26a; 258 F.3d at 1001; 38a-39a.)

2. A Number of Cases Support Respondents' Position

Several cases discussed at length in the Ninth Circuit's opinion support respondents' contention that the administrators were entitled to use the "W-2" definition of "employee" because it had been consistently applied in the past in determining who was eligible to participate in the plans. (*See* 23a-28a, citing *Allen v. W. Conference of Teamsters Pension Trust Fund*, 788 F.2d 648, 650 (9th Cir. 1986) (upholding denial of benefits even though administrators applied a definition of a plan term that conflicted with its established statutory definition); *Admin. Comm. of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson*, 164 F.3d 981, 986 (6th Cir. 1999) ("To limit an administrator's discretion to only those terms explicitly defined would undermine the administrator's discretionary power or require companies to write interminably long plans to account for every term."), *cert. denied*, 528 U.S. 1114 (2000); *Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan*, 102 F.3d 1435, 1440 (7th Cir. 1996) ("Nothing in ERISA . . . compels a plan to use the term 'employee' in the same way it is used in the statute." (citation and internal quotation marks omitted)); *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1113 (9th Cir. 2000) (holding that a consistent pattern of interpretation is "significant evidence"

that the administrator has acted reasonably).) These cases speak for themselves and are far more persuasive on the issue at bar than the cases relied on by petitioners.[4]

B. Certiorari Is Not Warranted Because The Challenged Holding Was Not Essential to the Ninth Circuit's Opinion

A writ of certiorari would accomplish little here because the "holding" of the Ninth Circuit challenged by petitioners was not essential to the disposition of this case. *California v. Rooney*, 483 U.S. 307, 312 & fn.5 (1987). The Petition focuses on the administrators' use of a "W-2" definition of the term employee, but fails to mention the Ninth Circuit's equally dispositive observation that the administrators also applied the common law standard—because petitioners had

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[4] The 1975 state court opinion in *Mayhew v. New England Teamsters*, 347 A.2d 610 (N.H. 1975) is simply incorrect and contrary to the weight of the recent federal case law discussed above. The *Mayhew* opinion was decided only a year after ERISA was enacted in 1974 and did not have the benefit of an established body of federal case law to guide its review of the administrator's decision. The premise of that court's conclusion–that employers may not exclude a class of "employees" from coverage under an ERISA plan–has been debunked by decisions of this Court and other federal courts which have held that an employer has no obligation to provide all "employees" with ERISA benefits. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) ("ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits."); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan"). The determination of *who* shall be covered by the plan is, in the first instance, a settlor function performed by the plan sponsor to which no fiduciary responsibility attaches. *Pegram v. Herdrich*, 530 U.S. 211 (2000) ("The specific payout detail of the plan [is] a feature that the employer as plan sponsor [is] . . . free to adopt without breach of any fiduciary duty under ERISA, since an employer's decisions about the content of a plan are not themselves fiduciary acts.").

asked them to do so—and that even under the common law standard, petitioners would lose. Specifically, the Ninth Circuit stated:

> Finally, *the Plan administrators considered the* Darden *factors in determining whether the plaintiffs were employees pursuant to the terms of the Plans, and concluded that they were not.*
>
> *In light of the evidence presented to the district court, and reviewing its decision* de novo, *we conclude the district court erred in denying NWP's motion for summary judgment. . .*
>
> In view of our foregoing conclusions, we need not address NWP's alternative argument that it has set forth an adequate basis from which it would be reasonable to conclude that the plaintiffs are not employees of NWP under the common law definition. *We note, however, that there was sufficient evidence of record to establish that the Plan administrators assessed the plaintiffs' relationship with NWP in light of the appropriate* Darden *factors and concluded that the plaintiffs were not common law employees.* But, inasmuch as we predicate our decision on our conclusion that the Plan administrators did not abuse their discretion in applying a W-2 definition of employee, we do not address this issue further.

(28a-29a); 258 F.3d at 1002 (emphasis added).

The administrators' review of petitioners' claims under the common law standard using the *Darden* factors is emphasized in the concurring opinion of Judge Rawlinson. (*See* 31a-32a); 258 F.3d at 1003. She expressly found it "unnecessary to reach the pivotal issue addressed in the majority opinion" and attacked by petitioners herein, "because the Plan Administrators applied common-law factors in determining plaintiffs' eligibility for plan benefits." (31a); 258 F.3d at 1003.

Petitioners admit that the underlying factual determinations of the administrators are entitled to substantial deference even if the determination of petitioners' employment status is ultimately a question of law. (*See* Petition at pp. 8-9.) A self-serving affidavit from one of the petitioners (60a-63a) cannot overcome the deference accorded to the administrators' factual findings, which the Ninth Circuit found "sufficient" to support the legal conclusion that petitioners were not "employees" of NWP for purposes of plan eligibility. (29a; 258 F.3d at 1002; *accord* 31a-32a; 258 F.3d at 1003, Rawlinson, J. concurring.)

There is no reason for the Court to review this case because the outcome is unchanged even if petitioners are correct in asserting that the administrators, as a matter of law, should have applied a common law definition of "employee." The record establishes that the administrators did review petitioners' eligibility claims under the common law standard in addition to, and apart from, the administrators' determinations that petitioners were ineligible under the historically and consistently followed "W-2" definition. As the Ninth Circuit stated without deciding, and as Judge Rawlinson explained in her concurring opinion, the record contains sufficient evidence to support upholding the administrators' conclusion that petitioners were not even common law "employees" of NWP, and thus were ineligible to participate in the plans no matter which definition of "employee" was utilized.

C. Even If Petitioners Are Correct, A Writ of Certiorari Is Not Appropriate Because the Ninth Circuit Would Have Simply Failed to Follow a Correct Statement of the Law

Absent extraordinary circumstances a writ of certiorari is not necessary merely to correct a lower court's error when it correctly states the law, but fails to properly apply it. *See, e.g., Burrell v. McCray*, 426 U.S. 471, 471-72 (1976)

(Stevens, J. concurring in dismissal of writ of certiorari as improvidently granted); *Watt v. Alaska*, 451 U.S. 259, 275 (1981) ("our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases") (Stevens, J. concurring). Here, even if one assumes *arguendo* that petitioners' position is correct, the Ninth Circuit properly stated the law. It can only be said to have erred in *applying* the law.

The Ninth Circuit has adhered to the principle that the arbitrary and capricious standard of review still provides that an abuse of discretion *per se* occurs when an administrator commits an error of law. (27a); *Vizcaino*, 120 F.3d at 1013; *Schikore v. Bank America Supplemental Ret. Plan*, 269 F.3d 956, 960 ("an error of law constitutes an abuse of discretion"). The Ninth Circuit found that the administrators of the plans committed no legal error in applying their well-established, reasonable "W-2" definition of "employee." If the Ninth Circuit erred in doing so (and it did not), then it erred only insofar as it failed properly to apply a rule of law that it properly stated. This Court need not take cases for the sole purpose of correcting error where the rule of law has been accurately stated.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES N. WESTWOOD *
JOHN V. ACOSTA
SCOTT E. CRAWFORD
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
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* Counsel of Record

Counsel for Respondents

APPENDIX A

RETIREMENT PLANS COMMITTEE

Mr. Kevin F. Kerstiens
Schwabe, Williamson & Wyatt
1600 Pacwest Center
1211 SW Fifth Avenue
Portland, OR 97204

Re: Claims of Sandy Hensley, John Wiest, Jr., Kate Burnham, Donna Hohnstein for Benefits Under Northwest Permanente, P.C. Retirement Plan and Trust

Dear Mr. Kerstiens:

This is in response to your June 28, 1995 letter in which you formally request benefits on behalf of Sandy Hensley, John Wiest, Jr., Kate Burnham, Donna Hohnstein ("claimants") under various Northwest Permanente retirement and benefit plans. In previous letters you stated that claimants consider themselves "employees of Northwest Permanent, P.C., for purposes of retirement and other employer-provided benefits." They seek benefits equal to the difference between the retirement benefits they have under the Kaiser Foundation Plan, Inc. Retirement Plan and the retirement benefits they would have had if claimants had been treated as employees of Northwest Permanente ("NWP") eligible to participate under the Plan.

Because I am the designated representative of the committee that serves as administrator of the Northwest Permanente, P.C., Retirement Plan and Trust (the "Plan"), I am responding

to your clients' request for benefits under that plan.[1] For the reasons detailed below, your clients' claim for benefits under the Plan must be denied.

(1) *Eligibility for Benefits Under the Plan.*

According to the terms of the Plan, a person is eligible to participate only if he/she is a "Qualified Employee." A Qualified Employee is defined in part as ". . .any employee of Employer." The Employer is defined under the Plan as NWP.

For your convenience, I am enclosing a copy of the Plan's eligibility sections with pertinent provisions highlighted.

(2) *Claimant's Eligibility Under the Plan.*

1. We conclude that claimants are not eligible to participate and receive retirement benefits under the Plan because they are not now, and have never been, employees of NWP. Because they are not employees of NWP, none of them are an "employee[s] of Employer," and therefore cannot participate under the Plan as Qualified Employees. In reaching this conclusion, I have considered the following facts:

2. Claimants each are employees of Kaiser Foundation Health Plan ("Health Plan"). They have at all times received their compensation, as well as retirement and welfare benefits, through Health Plan.

3. Health Plan withholds, reports and pays federal and state payroll taxes as the employer of claimants.

4. The facilities at which claimants work are owned by Health Plans and Kaiser Foundation Hospitals

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[1] The decision expressed in this letter is made solely with respect to your clients' eligibility under the Northwest Permanente, P.C. Retirement Plan.

("Hospitals").[2] NWP does not own or provide any facilities or equipment utilized by claimants in their employment as a physician assistants/nurse practitioners.

5. Claimants were hired to work for Health Plan and the circumstances of their employment indicate that they have been considered, and have considered themselves as, employees of Health Plan. Application forms, hire letters, other correspondence, membership on Allied Health administrative boards or committee, and other documents clearly indicate that it has always been the understanding of claimants, Kaiser and NWP that claimants are employees of Health Plan. The parties intended that each of the claimants would be, function as, and be treated as, an employee of Health Plan, not NWP.

6. Physicians who work for NWP do not have the authority to terminate claimants. Ultimate decisions concerning claimants' pay, benefits, hiring policies and termination are, and have always been, within the exclusive authority of Health Plan's Human Resources Department.

7. Health Plan defines all on-the-job grievance procedures available to claimants. Health Plan's Human Resources Department processes and resolves such grievances. NWP does not.

(3) *Review of Decision.*

Claimants may request a review of this decision by notifying me in writing. For your convenience, I have enclosed a copy of the claims procedures with the pertinent provisions highlighted. These will control the claims review process, should your clients choose to appeal this decision.

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[2] Health Plan and Hospitals are legally separate and distinct from NWP. They do not control, nor do they have any common ownership, with NWP.

If a review is requested, documents pertinent to your clients' claim will be made available for inspection. Also, a hearing to consider the request for review may be granted at the discretion of the administration. A written response to the request for review will be sent as soon as possible after such request, if any, is received.

Sincerely,

RETIREMENT PLANS COMMITTEE

by Ann Stenzel
Director, Pension and Benefits

cc: Mr. John Acosta

APPENDIX B

RETIREMENT PLANS COMMITTEE

January 30, 1996

Ms. Margaret Hoffman
Ms. Jill S. Gelineau
Schwabe, Williamson & Wyatt
1600 Pacwest Center
1211 SW Fifth Avenue
Portland, OR 97204

Re: Claims of Sandy Hensley, John Wiest, Jr., Kate Burnham, Donna Hohnstein for Benefits Under Northwest Permanente, P.C. Retirement Plan and Trust

Dear Ms. Hoffmann and Ms. Gelineau:

Ms. Gelineau's September 22, 1995 letter requested, on behalf of your clients, Sandy Hensley, John Wiest, Jr., Kate Burnham and Donna Hohnstein ("claimants"), review of the July 28, 1995 decision ("the Decision") denying claimants' claims for benefits under the Northwest Permanente Retirement Plan and Trust ("the Plan"). In its November 3, 1995 letter, the Retirement Plans Committee (the "Committee") advised claimants that their request for review of and hearing on the Decision was granted. On November 27, 1995, however, Ms. Gelineau advised Ms. Stenzel by letter that claimants' "request for hearing is withdrawn" and that claimants were requesting that "a final decision be made upon this matter based upon the record as it stands."

This letter is the Committee's ("Committee") response to claimants' request for review of the Decision.

1. *Matters Considered On Review.*

On review of the Decision, the Committee has considered the following:

1. December 22, 2994 from Kevin Kerstiens to Plan Administrator, Northwest Permanente, P.C. ("NWP");[3]

2. December 28, 1994 letter from John Acosta to Kevin Kerstiens, with enclosures;

3. January 31, 1995 letter from Kevin Kerstiens to John Acosta, with enclosures;

4. February 14, 1995 letter from John Acosta to Kevin Kerstiens;

5. February 15, 1995 letter from Kevin Kerstiens to John Acosta;

6. April 3, 1995 letter from Kevin Kerstiens to John Acosta;

7. April 5, 1995 letter from John Acosta to Kevin Kerstiens;

8. April 26, 1995 letter from John Acosta to Kevin Kerstiens;

9. May 12, 1995 letter from Kevin Kerstiens to John Acosta;

10. June 5, 1995 letter from John Acosta to Kevin Kerstiens;

11. June 28, 1995 letter from Kevin Kerstiens to John Acosta;

12. July 10, 1995 letter from John Acosta to Kevin Kerstiens, with enclosures;

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[3] This and the other documents listed herein are attached as Appendix A.

13. July 28, 1995 letter from John Acosta to Kevin Kerstiens;

14. July 28, 1995 letter from Ann Stenzel, on behalf of the Committee, to Kevin Kerstiens;

15. July 31, 1995 letter from John Acosta to Kevin Kerstiens, with enclosures;

16. September 21, 1995 letter from Ms. Hoffman to John Acosta;

17. September 22, 1995 letter from Ms. Hoffman to John Acosta;

18. September 22, 1995 letter from Ms. Hoffman to Ann Stenzel;

19. September 25, 1995 letter from John Acosta to Ms. Hoffman;

20. October 10, 1995 letter from Ms. Gelineau to the U.S. Department of Labor, Pension and Welfare Benefits Administration (Seattle office);

21. October 30, 1995 letter from the U.S. Department of Labor, Pension and Welfare Benefits Administration (Seattle office) to Plan Administrator, NWP;

22. November 3, 1995 letter from Ms. Stenzel, on behalf of the Committee, to Ms. Hoffman;

23. November 27, 1995 letter from Ms. Gelineau to Ms. Stenzel;

24. W2 forms, W4 forms, tax sheltered annuity forms, savings and retirement plan forms, employment application, and other documents pertaining to Ms. Hensley's employment by Kaiser Foundation Health Plan;

25. W2 forms, tax sheltered annuity forms, savings and retirement plan forms, employment application, tax

forms, and other documents pertaining to Mr. Wiest's employment by Kaiser Foundation Health Plan;

26. W2 forms, loan verification forms, tax forms, savings and retirement plan forms, employment application, and other documents pertaining to Ms. Burnham's employment by Kaiser Foundation Health Plan; and

27. W2 forms, time cards, savings and retirement plan forms, and other documents pertaining to Ms. Hohnstein's employment by Kaiser Foundation Health Plan.

By her November 3, 1995 letter, Ms. Stenzel advised claimants that their request for a hearing was granted, and you were asked to contact Mr. Acosta to schedule that hearing. Claimants were invited to submit "in advance of the hearing evidence and written arguments they wish to be considered prior to the hearing itself." Claimants were offered any additional information which you or they believed necessary to prepare for the hearing or to prepare and submit written materials in advance of the hearing.

Claimants declined the opportunity to submit material for the Committee's consideration and to present evidence and arguments at hearing. Ms. Gelineau's November 27, 1995 letter withdrew claimants' earlier request for a hearing and asked that the review be made based on "the record as it stands." Thus, the review proceeds on the current record without additional evidence or arguments from claimants.

2. *Summary of Initial Decision*

On July 28, 1995, Ms. Stenzel, for the Committee, advised Mr. Kerstiens that the claimants' claims for benefits under the Plan were denied. None of the claimants was a "Qualified Employee" of the "Employer." Under the Plan, a "Qualified Employee" is defined in part as "any employee of Employer,"

and the "Employer" is defined as NWP. The circumstances upon which the decision was based are set forth in Ms. Stenzel's July28, 1995 letter to Mr. Kerstiens, which letter is incorporated into this section.

3. Decision on Review

a. *Eligibility for Benefits Under the Plan.*

In his December 22, 1994 letter, Mr. Kerstiens stated that claimants consider themselves "employees of Northwest Permanente, P.C., for purposes of retirement and other employer-provided benefits." Claimants seek benefits equal to the difference between the retirement benefits they have under the Kaiser Foundation Health Plan, Inc. Retirement Plan and the retirement benefits they would have received if claimants had been treated as employees of NWP, eligible to participate under the Plan.

According to the terms of the Plan, a person is eligible to participate only if he or she is a "Qualified Employee." A Qualified Employee is defined in part as ". . . any employee of Employer." The Plan defines "Employer" as NWP.

The Committee concludes that the Plan definitions establish the criteria for claimants' eligibility for benefits under the Plan. Claimants have not disputed that these definitions govern the determination of their claims. Accordingly, the Committee's review of the Decision is based upon the undisputed applicability of these definitions.

b. *Claimants' Eligibility Under the Plan.*

The Committee concludes that claimants are not eligible to participate and receive retirement benefits under the Plan for two independent reasons. First, claimants have impliedly accepted the analysis contained in the Decision. Claimants neither disputed the findings in the Decision nor submitted

evidence or arguments controverting the analysis in the Decision. Claimants presented no information to support their claims for benefits other than that presented prior to the Decision, and thus they have not challenged the propriety of the Decision.

Second, and as an entirely independent and self-sufficient basis for denial of claimants' appeal, the Committee concludes that claimants are not eligible to participate and receive retirement benefits under the Plan because they are not now, and have never been, "employee[s] of Employer" under the Plan. Because claimants are not employees of NWP, they are not, under the Plan, "employee[s] of Employer," and they are not eligible to participate under the Plan as "Qualified Employee[s]." In reaching this conclusion, the following facts were deemed relevant, no one of which, standing alone, however, compelled the Committee's decision:

(1) Claimants each are employees of Kaiser Foundation Health Plan ("Health Plan"). Claimants at all times have received their compensation, as well as retirement and welfare benefits, through Health Plan. Mr. Kerstiens confirmed this in his December 22, 1994 letter to Mr. Acosta, which states that claimants "are paid by and receive their retirement and health benefits through Kaiser Foundation Health Plan of the Northwest." Various benefits and claim forms and other documents completed, signed, received or sent by claimants identify their employer as Health Plan or pertain to benefit plans available only to Health Plan employees and not to NWP physicians.

(2) Health Plan withholds, reports and pays federal and state payroll taxes as the employer of claimants. The W2 forms and W4 forms signed by claimants identify Health Plan as claimants' employer. NWP does not now, nor has it ever, treated claimants as its W2 employees. Nor has NWP

withheld, reported or paid any taxes attributable to the employment of claimants.

(3) Under the Plan, all benefits are based on W2 compensation. Claimants' W2 forms show that their W2 compensation is from Health Plan, and that their W2 compensation from NWP is zero. Thus, because claimants receive no W2 compensation from NWP, under the plan their benefit amount is zero. The drafter's intent, as well as the historical treatment of the terms "employee" and "Qualified Employee" under the Plan, limit participation to W2 employees of NWP, and none of the claimants is or has ever been a W2 employee of NWP.

(4) The facilities at which claimants work are owned by Health Plan and Kaiser Foundation Hospitals ("Hospitals").[4] NWP does not own or provide any facilities or equipment utilized by claimants in their employment as physician assistants and nurse practitioners.

(5) Each claimant was hired to work for Health Plan. Claimants' application forms confirm this, both by their content and form. Further, the application materials and process for NWP physicians are different, more voluminous, and longer. The circumstances of each claimant's employment indicate that he or she has been considered, and has considered himself or herself, an employee of Health Plan. Claimants' various benefit and claim forms, W2 and W4 forms, tax documents, and other documents, for example, demonstrate this understanding. Application forms, W2 and W4 forms, membership on Allied Health administrative boards of committees, and other documents support the inference that it has always been the understanding of claimants and Health Plan that claimants are employees of

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[4] Health Plan and Hospitals are legally separate and distinct from NWP. Neither Health Plan nor Hospitals controls or has any common ownership with NWP.

Health Plan. The parties intended that each of the claimants would be, function as, and be treated as, an employee of Health Plan.

(6) NWP physicians do not have the authority to terminate claimants. Ultimate decisions concerning claimants' pay, benefits, hiring policies and termination are, and have always been, within the exclusive authority of Health Plan's Human Resources Department.

(7) Health Plan establishes all on-the-job grievance procedures available and applicable to claimants. Health Plan's Human Resources Department processes and resolves such grievances. NWP does not.

(8) The Decision, as well as the findings and conclusions in this letter, are consistent with the findings in Internal Revenue Service's March 12, 1984 Private Letter Ruling, which determined that employees of Health Plan (such as claimants) need not be counted by NWP for tax purposes, because they are not "leased employees" under Section 414(n) of the Internal Revenue Code.

(9) The Decision, as well as the findings and conclusions in this letter, are consistent with the U.S. Department of Labor, Pension and Welfare Benefits Administration's ("Administration") October 30, 1995 letter to the Plan Administrator regarding the Administration's ERISA review of NWP. In her October 10, 1995 letter to the Administration, Ms. Gelineau set forth the bases of claimants' claims and stated that NWP's "failure to include these physician assistants and nurse practitioners in these plans jeopardizes the qualified status of the plans under the applicable Internal Revenue Code and ERISA [provisions] ***." Ms. Gelineau's letter included several attachments, including the July 28, 1995 letter advising of the Decision, for the Administration's consideration. Three weeks thereafter,

the Administration issued its notice of closure of ERISA review.

The Committee concludes that claimants are not eligible to participate and receive retirement benefits under the Plan. Therefore, the Committee must affirm the July 28, 1995 decision denying claimants' claims for benefits under the Plan.

Sincerely,

RETIREMENT PLANS COMMITTEE

by Harry Stathos

For the Retirement Plans Committee

cc (w/encls): Mr. John V. Acosta

bc (w/encls):

Mr. Thomas P. Deering
Mr. Scott Crawford
Ms. Kim Lomas

APPENDIX C

Executive Offices, Ordway Building

September 20, 1995

Mr. Kevin F. Kerstiens
Schwabe, Williamson & Wyatt
1600 Pacwest Center
1211 SW Fifth Avenue
Portland, OR 97204

Dear Mr. Kerstiens:

This letter is written on behalf of the Administrative Committee provided for under Permanente Physicians Retirement Plan for Northwest Permanente, P.C./Physicians & Surgeons ("Plan"). In preparing this letter, we have reviewed various correspondence exchanged between you and the law firm of Stoel Rives, and between you and the plan administrator for Northwest Permanente, P.C., Retirement Plan and Trust, regarding the claimed eligibility of Sandra Hensley, John Wiest, Jr., Katherine Burnham and Donna Hohnstein ("claimants") under various Northwest Permanente benefits plans. Included in this review was your June 28, 1995 letter to Mr. John Acosta, in which you describe the plans or programs under which your clients claim or intend to claim.

Any claim of eligibility, coverage or benefits under the Plan by the four persons referred to above is denied. The claimants are employees of Kaiser Foundation Health Plan of the Northwest ("Health Plan") and they are not employees of Northwest Permanente, P.C./Physicians & Surgeons ("Medical Group"). Only certain Medical Group employees

are covered by the Plan. Health Plan employees are not eligible to participate in the Plan.

If you wish to appeal this decision, please notify me in writing. The procedure for an appeal is set forth in the enclosed documents. That procedure will govern the appeal process regarding your claims except that the request for review need not be made within 90 days of receipt of the written denial of the claim. If your clients decide to appeal, they may inspect relevant documents, request a hearing, which hearing request may be granted at the discretion of the plan administrator, and receive a written response to their appeal, if an appeal is filed.

Sincerely,

Ellen Canter
Director, Employee Benefits

Services For and On Behalf of the Administrative Committee, Permanente Physicians Retirement Plan for Northwest Permanents, P.C./Physicians & Surgeons

APPENDIX D

December 13, 1996

Roland F. Banks, Esq.
Schwabe Williamson & Wyatt P.C.
1500 Pacwest Center
1211 SW Fifth Avenue
Portland, OR 97204

Re: Permanente Physicians Retirement Plan for Northwest Permanente, P.C./Physicians & Surgeons (the"Plan")—Claims of Sandra Hensley, John Wiest, Jr., Katherine Burnham and Donna Hohnstein (the "Claimants")

Dear Mr. Banks:

On behalf of the Administrative Committee (the "Committee") of the Plan, I am writing to inform you that the Committee has taken action on your request for an appeal of the Committee's initial denial of the Claimants' claims to be eligible as participants under the Plan, as requested in your letter dated June 11, 1996 to Ellen Canter. For the reasons set forth below, the Committee has determined that the Claimants are not "qualified employees" eligible to participate in the Plan. Therefore, the Committee has upheld its initial decision denying the Claimants' claim.

I. *Documents Considered By Committee*

In reaching its decision, the Committee considered your letter of June 11, 1996 and the following attachments:

1. Written Argument In Support of Appeal.

2. Affidavit of Sandra Hensley, with supporting documents, exhibits 1 through 22.

3. Affidavit of John Wiest, Jr., with supporting documents, exhibit 23.

4. Affidavit of Donna Hohnstein, with supporting documents, exhibits 24 through 25.

5. Affidavit of Katherine Burnham, with supporting documents, exhibits 56 through 58.

The committee also considered the Summary of Claims for Administrative Committee Review and Recommendation of Action (the "Summary of Claims"). For your convenience, a copy of the Summary of Claims is attached.

II. *Committee's Conclusions*

The Committee, which has the sole discretion to interpret the terms of the Plan and to determine eligibility for benefits under the Plan, determined that the Claimants are not employees of the Medical Group for purposes of the Plan. The Committee also concluded that the Claimants are instead employees of the Health Plan. Since the Claimants are not employees of the Medical Group, they cannot be "qualified employees" eligible to participate under the Plan. Therefore, the Committee concluded that the Claimants are not eligible to participate and receive benefits under the Plan.

In reaching the conclusion that the Claimants are not "qualified employees" eligible to participate in the Plan, the Committee made the following determinations:

1. *"Employee" Means W-2 Employee.* The Committee determined that the term "employee" as used in the Plan means an employee for whom the Medical Group files and IRS Form W-2 as employer ("W-2 employee"). The Claimants are not W-2 employees of the Medical Group. Since the Claimants are not W-2 employees of the Medical

Group, they are not "employees" for purposes of the Plan. Accordingly, the Claimants cannot be "qualified employees" eligible to participate in the Plan.

2. *Factors Indicate That Claimants Are Employees of Health Plan.* The Committee also concluded that the Claimants are common-law employees of the Health Plan, not the Medical Group. In reaching this conclusion, the Committee made the following determinations:

- Health Plan determines and pays Claimants compensation and benefits;
- Health Plan withholds, reports and pays federal taxes;
- Claimants perform work on Health Plan and Hospitals premises;
- Health Plan hired Claimants;
- Health Plan retains right to terminate Claimants;
- Health Plan grievance procedures apply to Claimants; and
- All parties considered Claimants to be employees of Health Plan.

3. *Private Letter Ruling Supports Finding that Claimants are not Medical Group Employees.* In reaching the decision that the Claimants are not employees of the Medical Group for purposes of the Plan, the Committee also relied on the Private Letter Ruling ("PLR") issued by the Internal Revenue Service (the "IRS") on March 12, 1984. The IRS acknowledged in this PLR that the Health Plan's employment of the allied health professionals who support the Medical Group is a well-established form of operation in the group practice prepaid health care field.

4. *Department of Labor Findings Support Committee's Decision.* The Committee also relied on the letter dated October 30, 1995 from the U.S. Department of Labor, Pension and Welfare Benefits Administration's (the "DOL") to the Plan Administrator of the Retirement Plan regarding the Claimants' claims. The DOL's swift conclusion of its review in this matter implies that the DOL did not find the Claimants' claims to have sufficient merit to require further investigation.

* * * * *

Please do not hesitate to call me if you have any questions regarding the foregoing.

Sincerely,

Ellen Canter
Director, Employee Benefits

Services For and On Behalf of the Administrative Committee, Permanente Physicians Retirement Plan for Northwest Permanente, P.C./Physicians & Surgeons

bc: Mr. John V. Acosta
Ms. Kim Lomax
Mr. Scott Crawford

Mrs. Barbara B. Creed
Mr. Robert A. Gordon
Ms. Laura A. Woodman